(26,653)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 567.

REDERIAKTIEBOLAGET ATLANTEN, PETITIONER,

vs.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 7, 1919.

a

Original.

United States Circuit Court of Appeals, Second Circuit.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET, Libelant-Appellee.

against

REDERIAKTIEBOLAGET ATLANTEN, Respondent-Appellant.

TRANSCRIPT OF RECORD.

On Appeal from United States District Court, Southern District of New York.

Office Supreme Court, U. S. Filed Jul- 20, 1918. James D. Maher, Clerk.

United States Circuit Court of Appeals, Second Circuit. Filed Sep. 27, 1917. William Parkin, Clerk.

1 United States District Court, Southern District of New York.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET, Libelant,

against

REDERIAKTIEBOLAGET ATLANTEN, Respondent.

Statement.

1915.

June 16. Libel filed.
Oct. 21. Answer filed.

1916.

Feb. 2. Exceptions to answer filed.
Feb. 2. Tried before Hon. Learned Hand, District Judge.
Feb. 11. Decision rendered in favor of libelant.

1917.

Feb. 9. Final decree entered.
March 5. Notice of appeal filed.
March 5. Assignments of error filed.

2 *Libel.*

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The libel of Aktieselskabet Korn-og Foderstof Kompagniet against Rederiaktiebolaget Atlanten, in a cause of contract, civil and maritime, alleges as follows:

First. The libelant at all the times hereinafter mentioned was and still is a Danish corporation, having its principal office and place of business in Aarhus, Denmark, and engaged, among other things, in dealing in cottonseed meal, cake and other feed stuffs, and in chartering vessels for the purpose of transacting its business.

Second. The respondent, Rederiaktiebolaget Atlanten, at all the times hereinafter mentioned was and still is a Swedish corporation, having its principal office and place of business in Helsingborg, Sweden, and the owner of the Swedish steamship Atlanten, which is of 1,266 ton- net register and able to carry above 3,000 tons of cargo, 10 per cent more or less, and at all said times Herm. Swenson was and is the manager thereof.

Third. On or about September 30, 1914, at Copenhagen, Denmark, a charter party in writing was duly entered into between the libelant and the respondents, whereby it was, among other things, agreed that the steamship Atlanten should proceed to the Gulf of Mexico or Savannah, calling at Key West for orders, and should load at "Galveston, New Orleans or Pensacola (one port), charterers' option Savannah," a full and complete cargo of oilcakes, which the libelant bound itself to furnish, and being so loaded should
3 therewith proceed "as ordered when signing bills of lading to one, two, three or four good safe Danish ports (Bornholm excluded * * *)" and deliver her cargo at such wharf, dock or other safe place as the libelant's agents should direct upon arrival, in consideration of which the ship was to be paid freight at a certain rate provided in said charter party. A true copy of said charter party is hereto annexed and made a part hereof, marked Schedule A.

Fourth. Thereafter the steamship Atlanten arrived at Pensacola, where the libelant furnished and provided a full and complete cargo of oilcake to be loaded on said steamship Atlanten and performed all the terms and conditions of said charter party on its part to be performed.

Fifth. The respondent and the steamship Atlanten failed and refused to load the cargo of oilcake furnished and provided by the libelant, or any part thereof, and on or about January 8th and January 14th, 1915, wrongfully notified the libelant that the aforesaid charter party was cancelled. True copies of the correspondence between the libelant and the respondent and English translations thereof with respect to such notification are hereto annexed and made a part hereof, marked Schedules B, C and D.

By reason of the failure of the respondent and the steamship Atlanten to load and transport said cargo of oilcake as agreed by the

aforesaid charter party the libelant was obliged to incur extra storage and other expenses and to charter another ship at a greatly increased rate of freight, to the libelant's damage in the sum of $44,000.00, no part of which has been paid, although duly demanded.

Sixth. The respondent is not within the jurisdiction of this Court.

4 Seventh. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, the libelant prays that process may duly issue against the respondent above named, and that it be cited to appear and answer this libel, and if it cannot be found then that its goods and chattels be attached in the amount sued for, with interest and costs, and that this Honorable Court will make a decree in favor of the libelant for its damages aforesaid, with interest and costs, and that the libelant may have such other and further relief as in law and justice it may be entitled to receive.

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Libelant.

SOUTHERN DISTRICT OF NEW YORK,
County of New York, ss:

Charles Burlingham, being duly sworn, deposes and says:

I am one of the proctors for the libelant herein. I have read the foregoing libel and know the contents thereof, and the same *is* true to the best of my knowledge, information and belief. The sources of my knowledge or information are statements made to me by a representative of the libelant and an examination of documents relating to the matter in suit. The reason why this verification is not made by the libelant is that the libelant is a foreign corporation, none of whose officers are within the City of New York.

CHARLES BURLINGHAM.

Sworn to before me this 16th day of June, 1915.

[SEAL.] G. G. ZABRISKIE,
Notary Public, New York County, No. 4315.

5 SCHEDULE A.

Stamp tr. 10.

Hecksher & Son Succsrs.,

Sworn Shipbrokers, Chartering Agents,

Copenhagen.

Founded 1797.

Telgrs. "Heckshers."

Net-Charter-Party.

Copenhagen, 30th September, 1914.

It is this day mutually agreed between Herm. Swensson Esq., Helsingborg, Owners of the Steamship "Atlanten" of 1266 tons net register classed #100 A I Br. Lloyd—now trading — and Korn & Foderstof Kompagniet, Aarhus, Charterers as follows:

1. That the said steamship being tight, staunch and strong and in every way fitted for the voyage (and according to Builders' scale and plan, which Owners believe to be correct but do not guarantee, able to carry abt. 3000 tons cargo 10% more or less in addition to necessary Bunker coal, and having — cubic feet, grain space, available for such cargo) shall proceed to the Gulf of Mexico or Savannah as ordered before leaving Europe for Gulf loading steamer to call at Key West for orders, the same to be given at once by Charterers on receipt of the Captain's telegram advising vessel's arrival there; to load at Galveston, New Orleans, Mobile or Pensacola (One port) Charterers' option Savannah according to custom of port always afloat a full and complete cargo of oilcake at shipper's risk, which Charterers bind themselves to furnish, and being so loaded shall therewith proceed, as ordered when signing Bills of Lading to one, two, three or four good and safe Danish ports (Bornholm excluded), orders for 2nd, 3rd and 4th port to be given latest at 1st, 2nd, 3rd port respectively or so near thereunto as she may safely get, and there always afloat, deliver the cargo as customary, at such wharf, dock or other safe place as Charterers' Agents may direct on arrival, in accordance with Bills of Lading; in consideration whereof the vessel shall be paid freight as follows:

If loading at Savannah

17 sh say Seventeen Shillings if discharging at one Danish port
17 — 3d Seventeen " three pence " " two " ports
17 — 6d Seventeen " Six " " " three " "
17 — 9d Seventeen " Nine " " " four " "

If loading at one Gulf port rate to be one shilling ton more all around
" " " Two " " " " " one " Six pence " "

2. Charterers agree to load the vessel to full draft allowed by Underwriters' Surveyors, failing which they are to pay dead-freight for the number of tons short-shipped as shown by the excess buoyancy.

3. Steamer to have liberty to sail with or without pilots, and to tow and assist vessels in all situations, also to coal at Gulf of Mexico, Norfolk or Newport News, in which case Charterers or their agents have the option of giving orders there; said orders to be given within 12 hours of arrival, or lay days to count, and for purposes of freight to be considered as given on signing of Bills of Lading. Captain to give written notice before signing Bills of Ladng whether he calls for coal or not, and at which coaling station. Steamer to have liberty to coal at Copenhagen. Steamer to have sufficient bunkers on board from America and not to call in Europe for bunkers.

4. Should the steamer be ordered to discharge at a port, where there is not sufficient water under normal conditions for the steamer to enter first tide after arrival, and to lie always afloat, lay days are to count from 24 hours after notice of arrival at nearest safe customary anchorage, and any lighterage incurred to reach the port of discharge is to be at the expense and risk of the receiver of the cargo, any custom of the port to the contrary notwithstanding.

5. Should the steamer be ordered to a port of discharge in the Sound, Sweden or Denmark inaccessible by reason of ice on the steamer's arrival, the Master shall have the option of waiting until the port is again open, or of proceeding to the nearest safe open port or roadstead (telegraphing his arrival there to Charterers), where he shall receive fresh orders for an open and accessible port of discharge, within said countries, as above, within 24 hours of arrival or lay days to count. If so ordered, the steamer shall receive the same freight as if she had discharged at the port, to which she was originally ordered.

6. Freight payable per ton of 2240 lbs. delivered, on right delivery of cargo, in cash, at current rate of exchange.

7. Charterers to have the privilege of designating wharves or other safe places for loading or discharging. The cargo to be brought to, and taken from alongside the steamer at merchant's risk and expense. Steamer to supply steam and winchmen to drive winches, and to give use of necessary gear, also to load or discharge at night, on Sundays or Holidays or on day when notice is given, if required by Charterers such time not counting, they paying all extra expenses and labor incurred including overtime of winchmen.

8. Cash for Captain's ordinary disbursements at port of loading to be advanced, if required, steamer paying two-and-a-half per cent. commission and cost of Insurance thereon, the amount of advance to be covered by Captain's draft, payable three days after ship's arrival at port of discharge out of freight and on which the draft shall form a lien.

9. Charterers are to load, stow and trim the cargo at their own expense, under the direction of the Master, but they shall not be responsible for improper stowage. Charterers to pay all port charges incidental to the outward cargo at loading port or ports, including

elevating stevedore, wharfage, tarpaulins, and to provide and fill sacks required to secure bulk grain, also dunnage mats, if required, and to provide an agent for Custom House business, but owners to pay all port and other charges at loading port until steamer arrives at loading berth.

10. Charterers' Agents to pay cost of discharging cargo, pilotage, and all port charges incidental to their cargo at the discharging port, to which Steamer may be ordered, and to provide an agent for the Custom House business at their expense, at Copenhagen Hecksher & Son Succsrs. If owners employ tally clerks for receiving or delivering cargo, charterers' tally clerks to have the preference at equal rates.

11. Charterers to have use of any dunnage or mats, etc. as may be aboard.

12. The steamer shall be consigned to Charterers' Agents at ports of loading and discharge, and shall employ their Broker to attend to the Ship's business at their expense, at Copenhagen Hecksher & Son, Succsrs.

13. The Captain shall sign Bills of Lading or Master's Receipts as and when presented, without prejudice or reference to this Charter-party, and any difference between the amount of freight by the Bills of Lading and this charter-party, to be settled at port of loading before sailing, as customary.

14. Lay days at port or ports of loading are not to count before the 15th Decbr. A C unless with Charterers' written consent and to commence on the day following receipt by Charterers' Agents of captain's written notice of readiness, accompanied by Surveyor's certificate. Should the steamer not be ready to load on or before noon of the 15th January 1915 the Charterers have the option of cancelling this Charter-party.

Lay days at port or ports of discharge to commence on the day following receipt by charterers' agents of Captain's written notice of readiness.

15. If the steamer be not sooner dispatched fifteen (15) running days (Sundays and Holidays excepted) shall be allowed the Charterers for loading and discharging. Should the cargo not be delivered to vessel at loading port and/or discharged at port or ports of destination within the specified time, for each and every day over and above said lay days, Charterers are to pay, day by day the sum of four pence per net register ton per day demurrage, any detention through quarantine to vessel or cargo not to count in lay days. If sooner dispatched, steamer to pay £10 for each day saved.

16. The clauses herein regarding payment of port charges, stevedores, etc. at ports of loading and discharge refer only to such charges as are ordinarily incurred, any extra expenses caused by the steamer being under average, are to be adjusted in the usual way. All spaces to be placed at charterers' disposal, which would be used for cargo, if loading for owner's account, and where cargo has been carried before.

17. If the cargo cannot be delivered, loaded or discharged by reason of a strike or lock-out of any class of workmen or stoppage of

labor or lighters, or anything beyond the control of the charterers or receivers essential to the delivery, loading or discharging of the cargo, the days for loading and discharging shall not count during the continuance of such strike, stoppage or lock-out. A strike of the receiver's men only shall not exonerate him from any demurrage, for which he may be liable under this Charter, if by the use of reasonable diligence he could have obtained other suitable labor or lighters.

18. If the nation under whose flag the vessel sails be at war, whereby her free navigation is endangered, thereby causing extra or prohibitory insurance on the cargo, the charterers shall have the privilege of cancelling the charter-party at the last out-ward port of sailing, or at any subsequent period when the difficulty may arise previous to cargo being shipped. Charterers or stevedores shall not be responsible for any damage occurring while loading or discharging cargo by reason of any defect in vessel's machinery or tackle, nor for neglect on the part of vessel's officers or crew.

19. The act of God, perils of the sea, fire on board in hulk or craft, or on shore, barratry of the Master and crew, enemies, pirates and thieves, arrests and restraints of princes rulers and people, collisions, stranding, and other accidents of navigation excepted, even when occasioned by negligence, default or error in judgment of the Pilot, Master, Mariners, or other servants of the shipowners. Not answerable for any loss or damage arising from explosion, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull, not resulting from want of due diligence by the owners of the ship, or any of them, or by the ship's Husband or Manager. General average shall be adjusted according to York-Antwerp Rules, 1890.

It is also mutually agreed that this shipment is subject to all terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States, approved on the 13th day of February 1893, and entitled, "An Act relating to Navigation of Vessels," & etc. and Bills of Lading are to be signed in conformity with said Act.

20. Charter's liability to cease when the cargo is shipped, except for expenses under clause 10, the Owner or Master of the steamer having an absolute lien upon the cargo for the recovery and payment of all freight, dead freight and demurrage.

21. If any dispute arises the same to be settled by two referees, one appointed by the Captain and one by charterers or their agents, and if necessary, the arbitrators to appoint an Umpire. The decision of the arbitrators or Umpire, as the case may be, shall be final, and any party attempting to revoke this submission to arbitration without leave of a court, shall be liable to pay to the other, or others, as liquidated damages, the estimated amount of chartered freight.

22. Owners shall furnish charterers with a copy of vesesl's scale and plan showing cubic capacities of all holds and space upon signing of this Charter-Party.

23. Owners or Master shall cable vessel's departure from last port to enter upon this charter, and they shall telegraph likewise, at once, if any accident happens to the vessel while under this contract.

24. Penalty for non-performance of this agreement to be proven damages, not exceeding estimated amount of freight.

25. The Brokerage of 3 per cent. on the gross amount of freight, dead freight and demurrage including charterers share due under this Charter-Party, steamer lost or not lost, shall be paid by Owners to Hecksher & Son Succsrs. Copenhagen or order.

26. Charterers have the option of ordering the steamer to 1-2-3 or 4 Swedish ports always afloat between Goteborg and Ystad incl. paying One shilling extra freight per ton all round basis one port.

27. Steamer to proceed homewards via Skagen. north of Scotland.

28. If Flinterenden &/or Drugden should be unpassable the steamer not to be ordered South of Malmo.

For the charterers and the owner according to orders:

(Sign.) HECKSHER & SON SUCCSRS.,
Through J. A. LINNEBALLE,
Sworn Shipbroker.

For a true copy:

HECKSHER & SON SUCCSRS.,
Through J. A. LINNEBALLE,
Sworn Shipbroker.

6

SCHEDULE B.

Helsingborg, den 8 Jan. 1915.
8 - Jan. 1915.

Herm Swensson.

Telegramadress: "Herman."

Rederiaktiebolaget Atlanten:

S/S Atlanten ..... 1200 stds=3200 tons excl. bunkers.

Aktiebolaget Kattegat:

S/S Signe ..... 1400 stds=3800 " " "
" Lilly ..... 750 " =2250 " " "
" Georgia ..... 740 " =2050 " " "
" Kattegat ..... 550 " =1500 " " "

Aktiebolaget Skagerack:

S/S Anton ..... 730 stds=2000 " " "

Scott's Code.
Watkins' Code.

HERRAR HECKSHER & SONS,
Eftfr, Köpenhamn, Danmark.

S. S. "Atlanten."

Med anledning af de svarigheter, som efter hand uppstatt för sjöfärten, hvarigenom driftkostnaderna sprungit i höjden, för att

blott nämna besättningens stegrade pretentioner pa hyror och pa s. k. krigsriskersättningar etc., och icke minst pa grund af den nu ökade krigsrisken, som gör, att vi med säkerhet kunna
7 förvänta det angaren pa hemvägen kommer att blifva uppbringad af engelsmännen beklaga vi maste meddela, att vi se oss nödskade cancellera s. s. "Atlantens" C. P. Pensacolá Skandinavien och äro beredda taga de konsekvenser, som lagen, i aberopande af C.Ps. § 24, adömer oss, dock ej öfverstigande det beräknade fraktbeloppet.

Vi vilja dock gifva befraktarna tillfälle använda sig af s. s. "Atlentens" position emot att de betala en frakt, utgörande skillnaden mellan certepartiets rate och current rate, hvilken sistnämnda vi beräkna till 60/-pr ton för lastning fran Gulfen. Om dylik öfverenskommelse kan träffas, är det underförstadt, att det if ragavarande C. P. annulleras utan nagra som helst repressalier.

s. s. "Atlanten" beräknas inträffa i Pensacola den 18 Januari och kan i sa fall cara utlossad därstädes omkring den 23 dennes. Angaren har pa resan ut varit inne pa Azorerna den 30 & 31 Dec. pa grund af hardt väder och för komplettering af bunkers.

Vi anhalla att skyundsammast fa emotse befraktarnas svar, enär vi äro offererade högre frakt än den uppgifna af svenska befraktare.

Högaktningsfullt
Rederiaktiebolaget Atlanten
Herme. Swensson.

8 The translation of above reads as follows:

Helsingborg, Jan. 8th, 1915.

Herm. Swensson.

Cable Address "Herman."

Rederiaktiebolaget Atlanten:

S/S Atlanten .....1200 stds=3200 tons excl. bunkers.

Aktiebolaget Kattegat:

S/S Signe	1400	stds=	3800	"	"
" Lilly	750	" =	2250	"	"
" Georgia	740	" =	2050	"	"
" Kattegat	550	" =	1500	"	"

Aktiebolaget Skagerack:

S/S Anton	730	stds=	2000	"	"

Scott's Code.
Watkins' Code.

MESSRS. HECKSHER & SONS,
Eftfr., Copenhagen, Denmark.

S. S. "Atlanten."

On account of the difficulty which is constantly arising for shipping and thus causing an advance in current expenses due to the crew's demand for higher wages and war risk allowances and also the increased war risk in so much as the steamer is liable to be seized on her way home by the English, we regret to advise that we are compelled to cancel the "Atlanten's" charter party Pensacola to Scandinavia, and are ready to take all the consequences the Court after Clause No. 21 in the Charter Party will compel us to pay, not exceeding the estimated amount of freight.

9 We will, however, give the Charterer opportunity to make use of the position of the S/S "Atlanten" if they pay us a freight equal to the difference between the rate of charter party and the current rate which we calculate to 60/-per ton loading in Gulf. If said arrangement can be made, it is, of course, understood that the charter party in question is cancelled without any reprisal whatever.

S/S "Atlanten" is calculated to be at Pensacola on the 18th of Jan. and in such case will probably finish discharging there about the 23rd Jan. This steamer called at Azores 31st Dec. on account of bad weather for completion of bunkers.

We hope to receive a prompt answer from the charterers, as we have been offered a higher rate than the above mentioned from Swedish Charterers.

Yours truly,

REDERIAKTIEBOLAGET ATLANTEN.
(Signature unreadable.)

10 SCHEDULE C.

Kjebenhavn. B. 13 Januar 1915.

Kopi
Actieselskabet
Korn-og Foderstof Kompagniet.

Telegram-Adresse:
"Corn."

Telefon Nr. 5960 & 5961.

Statstelefon Nr. 116.

Herr Herm. Swensson,

Helsingborg.

s. s. "Signe" Certeparti 11 Sept.
s. s. "Atlanten" Certeparti 30 Sept.

Refererende til de Underhandlinger, der iaftes fandt Sted i Helsingborg, har De altsaa annulleret Certepartierne for ovennaevnte Dampere. Da De samtidigt tilbod os Baadene paany, men til en hojere Fraget og under visse Betingelser, er det klart, at De forsätlig

vil bryde Deres Certeparti alene for at opnaa en storre Fortjeneste paa vor Bekostning. Vi forlanger Certepartiet *opfyldt* og hvis De ikke gor dette, gor vi Dem ansvarlig for ethvert Tab, De derved paaforer os, hvad enten dette opstaar ved, at vimikke kan opfylde vore Salgskontrakter eller derved, at vi tvinges til at chartre andre Dampere til hojere Fragter, saavelsom det Tab, der paa enhver Maade maatte opstaa for os ved at vi ikke kunne aftage Varerne fra Amerika, derunder Oplägningsudgifter, Udgifter ved Konservering af Varerne, disses mulige Fordärvelse, samt alle Udgifter ved Retssager, idet vi vil benytte alle lovlige Retsmidler for at
11 tvinge Dem til at opfylde Deres Kontrakt og til Erstatning for ethvert Tab, De maate paafore os ved Deres retsstridige Adfärd, saavel som Renter af disse Belob. Modtagelsen af dette Brev bedes anerkendt.

Med Hojagtelse
Aktieselskabet
Korn-og Foderstof Kompagniet
(s) Hansen.

The translation of the above reads as follows:

Copenhagen, Jan. 13th/15.

Aktieselskabet
Korn-og Foderstof Kompagniet
Cable Address
"Corn"
Telephone No. 5960 & 5961

State Telephone No. 116.

Mr. Herm. Swensson,
Helsingborg.

s. s. "Signe" Certeparti 11 Sept.
s. s. "Atlanten" Certeparti 30 Sept.

Referring to the negotiations which took place yesterday in Helsingborg, you have thus cancelled the charter parties for these steamers. As you at the same time offered the vessels again but at a higher freight and with certain conditions, it is clear that you purposely cancelled the charter parties alone only to enable you to make larger profit at our expense. We demand the charter parties to be fulfilled, and if you do not do so, we will make you responsible for all losses you thereby cause us to incur, both by making it impossible for us to fulfill our sale contracts or by we being compelled to
12 charter other steamers at a higher rate, as well as the losses which may incur to us by being unable to lift the cargo in America and thereby necessitate storage and preservation expenses possible deterioration of the cargo and all other current expenses. We will make use of all legal means to compel you to fulfill your contracts and to pay us an indemnity for all losses you have incurred to us by your illegal procedure, as well as the interest on these amounts.

Please acknowledge receipt of this letter.
Yours truly,

AKTIESELSKABET
KORN-OG FODERSTOF KOMPAGNIET
(Signed) Hansen

13

Schedule D.

Helsingborg den 14 Jan. 1915.

HERM. SWENSSON

Telegramadress:
"Herman"

Rederiaktiebolaget Atlanten:

S/S Atlanten .....1200 stds=3200 tons excel. bunkers

Aktiebolaget Kattegat:

S/S Signe	1400	stds=3800	"	"	"
" Lilly	750	" =2250	"	"	"
" Georgia	740	" =2050	"	"	"
" Kattegat	550	" =1500	"	"	"

Aktiebolaget Skagerack:

S/S Anton	730	stds=2000	"	"	"

Scott's Code.
Watkins' Code.

Aktieselskabet Korn-og
Foderstof Kompagniet
KOPENHAMN B.
Danmark

s. s. "Atlanten" & s. s. "Signe."

Vi fa härmed erkänna ingangen af Edert ärade af den 13 dsoch fa till svar endast hänvisa till vara föregaende bref i denna sak, hvari vi papekat nagra orsaker som motiv för var atgärd att annullera rubr, angares certepartier.
Vi hafva nu definitivt beslutat oss för cancelleringen.

Högaktningsfullt
Rederiaktiebolaget Atlanten
Aktiebolaget Kattegat
Herm. Swensson.

Rskommendsras.

14 The translation of above reads as follows:

Helsingborg, Jan. 14th, 1915.

Herm. Swensson.

Cable Address
"Herman"

Rederiaktiebolaget Atlanten:

S/S Atlanten .....1200 stds=3200 tons excel. bunkers

Aktiebolaget Kattegat:

S/S Signe	1400	stds=3800	"	"	"
" Lilly	750	" =2250	"	"	"
" Georgia	740	" =2050	"	"	"
" Kattegat	550	" =1500	"	"	"

Aktiebolaget Skagerack:

S/S Anton	730	stds=2000	"	"	"

Scott's Code.
Watkins' Code.

Aktieselskabet Korn-og Foderstof Kompagniet,
Copenhagen, Denmark.

s. s. "Atlanten" & s. s. "Signe."

We hereby acknowledge receipt of your letter of the 13th, and in reply can only refer you to our previous correspondence in regard to this matter wherein we pointed out some reasons as motive for our stand to cancel the above mentioned steamer charter parties.

We have now definitely decided to cancel the charter parties.

Yours truly,

REDERIAKTIEBOLAGET ATLANTEN
AKTIEBOLAGET KATTEGAT
(Signature unreadable.)

15 *Interrogatories Attached to the Foregoing Libel to be Answered Under Oath by the Respondent or Its Duly Authorized Agent.*

1. State whether or not the respondent sent the letters dated January 8, 1915, and January 14, 1915, copies of which and English translations thereof marked Schedules B and D respectively, are annexed to the libel herein.

2. State whether or not respondent received the letter dated Jan-

uary 13, 1915, a copy of which and English translation thereof marked Schedule C is annexed to the libel herein.

Endorsed: Libel and Interrogatories. Filed June 16, 1915.

Answer.

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The answer of Rederiaktiebolaget Atlanten to the libel of Aktieselskabet Korn-og Foderstof Kompagniet, in a cause of contract, civil and maritime, alleges on information and belief as follows:

First. Denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in the First Article of the libel.

Second. Admits the allegations contained in the Second Article of the libel.

Third. Admits the allegations contained in the Third Article of the libel.

Fourth. Denies that it has any knowledge or information
16 sufficient to form a belief as to the truth of any of the allegations contained in the Fourth Article of the libel.

Fifth. Admits that the Steamship Atlanten failed to load the cargo of oil-cake referred to in said charter party and notified the libelant that the said charter party was canceled, and that Schedules B, C and D annexed to the libel are true copies of the correspondence between the libelant and the respondent and English translations thereof, but denies each and every other allegation contained in the Fifth Article of the libel.

Sixth. Admits the allegations contained in the Sixth Article of the libel.

Seventh. Denies that all and singular the premises of the libel are true, and alleges that this Honorable Court in its discretion, should not take jurisdiction in this case.

Eighth. Further answering the libel herein, and as a separate and partial defense thereto, the respondent alleges that the charter party between the libelant and the respondent, dated September 30, 1914, referred to in the Third Article of the libel, contains other and further clauses than those set forth in the libel. In one of these the parties liquidated their damages and fixed a limit to the recovery, in case of non-performance, beyond which damages could not be recovered. By the 24th clause of the charter party it was provided that, in case of a breach, recovery should be had for the proven damages, not exceeding the estimated amount of freight. This limitation of value was a reasonable limitation, and for any damage, sustained by failure to carry out the charter party, the libelant cannot recover more than the actual amount of freight which would have been payable had the contract been carried out. These dam-
17 ages the respondent was ready, willing, and offered to pay at the time of the breach, as appears also from Schedule B annexed to the libel herein.

Ninth. Further answering the libel herein, and as a further separate and complete defense thereto, the respondent alleges that the charter party between the libelant and the respondent, dated September 30, 1914, contains other and further clauses than those set forth in the libel. Each and every matter or thing set forth or referred to in the libel is a dispute arising under said charter. Said charter was made and entered into by the libelant, which is a Danish corporation, and the respondent, which is a Swedish corporation, and was executed and delivered in Copenhagen, Denmark, on or about the 30th day of September, 1914.

Tenth. The 21st clause of said charter party reads as follows:

"21. If any dispute arises the same to be settled by two referees, one appointed by the Captain and one by charterers or their agents, and if necessary, the arbitrators to appoint an Umpire. The decision of the arbitrators or Umpire, as the case may be, shall be final, and any party attempting to revoke this submission to arbitration without leave of a court shall be liable to pay to the other, or others, as liquidated damages, the estimated amount of chartered freight."

Eleventh. At the time of the making, execution and delivery of the said charter party it was, and at all times since then has been, the law of the Kingdom of Denmark, applicable to said charter party, that a provision in a charter party that any dispute arising thereunder should be settled by arbitration, each party nominating their arbitrator and the latter agreeing upon an umpire, if neces-
18 sary, is a valid and binding agreement for arbitration, and is binding upon each party to the said charter party, and arbitration accordingly of any dispute arising thereunder is a condition precedent to the right of either party to sue the other in any court for, upon or by reason of any matter or dispute with respect to or arising under said charter.

Twelfth. The law of Sweden is the same as that of the law of Denmark, as stated in the Eleventh Article of this answer.

Thirteenth. The respondent is, and at all times since the 30th day of September, 1914, has been, ready and willing to arbitrate, in accordance with the terms of said charter party, any and all matters or disputes with respect thereto or arising thereunder, and the libelant has failed and neglected so to do.

Fourteenth. Under and by virtue of the law of the Kingdom of Denmark and the Kingdom of Sweden, as it now exists, and as it did exist at the time of the execution and delivery of the charter party above referred to, and at all times since then the plaintiff is not and never was entitled to bring any libel in any court for, upon or by reason of any matter or dispute set forth or referred to in the libel herein; but is and at all said times has been obligated to submit all matters and things in dispute, or for which recovery is sought in this action, to arbitration, in accordance with the terms of the charter party; and now has and at all times has had the right specifically to compel the respondent to submit all said matters and things in dispute, and all matters and things for which recovery is sought in this action, to arbitration as aforesaid.

19 Fifteenth. All matters referred to in the libel relate to a dispute between foreigners, in connection with a contract made in Denmark, and this Court should not entertain jurisdiction thereof.

Wherefore respondent prays that the libel be dismissed, with costs.

HAIGHT, SANDFORD & SMITH,
Proctors for Respondent.

27 William Street, New York City.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Clarence Bishop Smith, being duly sworn, deposes and says: That he is a member of the firm of Haight, Sandford & Smith, proctors for the respondent herein; that he has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief, derived from letters received from the respondent.

The reason why this verification is not made by the respondent is that it is a foreign corporation, none of the officers whereof is now within the United States.

CLARENCE BISHOP SMITH.

Sworn to before me this 20th day of October, 1915.
[SEAL.] RUDOLPH A. TRAVERS,
Notary Public, Bronx Co.

Cert. filed in N. Y. Co.

Endorsed: Answer. Filed Oct. 21, 1915.

20 *Exceptions to Answer.*

United States District Court, Southern District of New York.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET, Libelant,

against

REDERIAKTIEBOLAGET ATLANTEN, Respondent.

First. The libelant hereby excepts to the matters alleged in the eighth article of the respondent's answer on the ground that the same are insufficient in law upon the face thereof to constitute any defense to the libel herein.

Second. The libelant hereby excepts to the matters alleged in the ninth, tenth, eleventh, twelfth, thirteenth and fourteenth articles of the respondent's answer on the ground that the same are insufficient in law upon the face thereof to constitute any defense to the libel herein.

Third. The libelant hereby excepts to the matters alleged in the fifteenth article of the respondent's answer on the ground that the

same are insufficient in law upon the face thereof to constitute any defense to the libel herein.

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Libelant.

27 William Street, New York City.

Endorsed: Exceptions to Answer. Filed Feb. 2, 1916.

21 *Opinion.*

United States District Court, Southern District of New York.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET

against

REDERIAKTIEBOLAGET ATLANTEN.

This is a libel in admiralty to recover damages for the breach of a charter party against the owner. On January 8, 1915, the owner without excuse withdrew the ship from the charter and employed her upon another voyage. Thereupon the charterer libelled her and set up the charter party and the letter of withdrawal as part of his libel. To this the owner pleaded, first, that the charter party had been made in Denmark between two corporations of Sweden and Denmark, and that the charterer had made no tender of arbitration under an arbitration clause, valid in Denmark and Sweden, which read as follows:

"21. If any dispute arises the same to be settled by two referees, one appointed by the Captain and one by charterers or their agents, and if necessary, the arbitrators to appoint an Umpire. The decision of the arbitrators or Umpire, as the case may be, shall be final, and any party attempting to revoke this submission to arbitration without leave of a court shall be liable to pay to the other, or others, as liquidated damages, the estimated amount of chartered
22 freight."

Second, the owner pleaded that the recovery, if any, must be limited to the amount of the freight under the following clause No. 24 of the charter party:

"Penalty for non-performance of this agreement to be proven damages, not exceeding estimated amount of freight."

Third, the owner pleaded that this court should not take jurisdiction of a cause between two foreign corporations.

Charles Burlingham and Roscoe H. Hupper for the libelant.
Clarence B. Smith for the respondent.

LEARNED HAND, *D. J.*:

Were not the law of Denmark and Sweden pleaded so broadly, I think that it would be possible to dispose of the arbitration clause

without recourse to the question whether such clauses go to the remedy and not to the right. It is clear that the respondent did not intend to rely upon the clause in the letter of January 8, 1915, and did not suppose the case was one for arbitration at all. What it did rely on was the penalty clause under which it thought itself protected and which made it to its interest to repudiate as soon as freight got above 34 shillings. The attempt at justifying this repudiat*oin* wholly fails; the respondent violated its contract without any shadow of excuse. It even made the proposal to the libelant to take a new charter at 60 shillings, the libelant to bear the difference between that and the supposed limitation of liability. Any effort to mitigate this violation of good faith on the score of danger to the ship is answered by this proposal to undertake the same voyage.

23 Aside from the failure of the respondents to rely on arbitration, the clause would itself be irrelevant to the controversy, if the laws of Denmark and Sweden merely permitted arbitration. Though such a clause be valid in those countries, there is no reason to suppose that it has a different interpretation from the reasonable meaning of the words. I should suppose, therefore, that the rule would not be different, as to whether the clause survived an unconditional repudiation, from the rule in this country and Great Britain. If not, I am satisfied that the arbitration clause need not trouble the disposition of the cause, because it could not survive such a total repudiation as this, made without any excuse. This particular clause was certainly not intended to apply to such a case as this because the ship's arbitrator was to be picked by her captain, and it is absurd to suppose that the captain was to pick an arbitrator over the withdrawal of her owners. The withdrawal was before the voyage began, even before the ship had been delivered. Whatever be the rule applicable to arbitration clauses of more general form there can be no doubt that this clause was meant to apply only to disputes which might arise during the voyage and while the parties were at least trying to go on with its execution. Indeed, the only authority upon the subject which has been cited seems to make it a general rule that such clauses do not survive a general repudiation of the contract, Jureidini v. National British Millers Ins. Co., 1915 A. C., 499. The theory appears to be that such a provision is part of the execution of the contract, a piece of its administration and ought not to be construed as applicable to an entire change of purpose which results in the abandonment by one party of the enterprise as a whole.

24 However, the allegations of the answer do not admit of this method of disposing of the point, for they contain the statements that under the law of Denmark and Sweden arbitration is the condition precedent to any suit in any court "for, upon or by reason of any matter or dispute with respect to or arising under said charter." This, taken merely as an allegation, and it must be so taken on exceptions, would cover a suit for repudiation of the charter party as an entirety. Therefore, it becomes necessary to determine whether the clause goes to the right or to the remedy and whether it is a

condition precedent under our law if it goes only to the remedy.

Such clauses, if regarded as conditions precedent to any action, have, I believe, nearly always been held to touch the remedy and not the right, Meachem v. Jamestown etc. Co., 211 N. Y., 346; U. S. Asphalt Co. v. Trinidad Lake Petroleum Co., 222 Fed. R., 1006. They do not affect to touch the obligations of the parties, as surely they do not; they prescribe how the parties must proceed to obtain any redress for their wrongs, which means one's remedies. In one sense everything which touches the remedy touches the obligation, since the only sanction to performance rests in the remedy; but that is the speech of philosophers, not of lawyers, among whom the distinction has arisen and is real. I think we must therefore regard it as going only to the remedy.

I do not propose to consider the very vexed question whether an arbitration clause, which purports to cover all disputes and not merely the quantum of the award, may be valid, if it be clearly meant as a condition precedent. In the State of New York it certainly is invalid, Meachem v. Johnstown etc. Co., 211
25 N. Y., 346, and undoubtedly Scott v. Avery, 5 H. L. Cas., 811, has been understood very generally in this country as so fixing the law. The judgments in Exchequer Chamber, 8 Exch., 497, did proceed upon that distinction, but those in the House of Lords are, to say the least subject to a different interpretation. An entirely different question is whether the arbitration clause is a collateral undertaking, or a condition precedent. The latter question itself depends upon two questions, first, whether the distinction between condition and collateral contract touches only the remedy, and, second, whether this is a case of condition or not. That the distinction is a question of remedy, concerning as it does what are the conditions upon which suit may be brought, hardly requires more discussion after what has been said above. The court of the forum must determine what impediments, if any, exist to the exercise of its jurisdiction. The second question is whether under the lex fori such a clause as this does impose a condition upon any suit. Expressly it does not do so, but instead of a condition imposes a penalty for refusal to abide by an award. Such a clause was held in Hamilton v. Home Ins. Co., 137 U. S., 370, to be collateral and collateral only. This rule is no doubt extremely technical, U. S. Asphalt Co. v. Trinidad Lake Co., supra, but I can hardly disregard the fact that it was the basis of the actual decision in the Supreme Court, nor does it follow that that decision was wrong because no damages can be recovered under the penalty clause attached, Munson v. Straits of Dover, 102 Fed. R., 926.

The next question is of damages, i. e., whether clause 24 is to be taken in limitation of liability, or as a penalty. An English case is directly in point for the libelant, Wall v. Rederiaktiebolaget,
26 1915, 3 K. B., 66, the theory of the court being that the evolution of the clause showed it to retain the same character of a penalty which it originally had. We meet it over a hundred years ago in the form: "Penalty for non-performance, £1300." In this form it is regarded as a penalty pure and simple and as such it is

not enforceable, Harrison v. Wright, 13 East., 343. Later, in what was perhaps an effort to avoid that result, it appears as follows: "Penalty for non-performance estimated amount of freight," which is its commonest form. As such it has twice been declared to be still a penalty, Watts v. Camors, 115 U. S., 353; Ströms Bruks Aktiebolaget v. Hutchinson, 10 Aspinall, N. S., 138, affirming 41 Sc. L. R., 274. In the first case the court declined to enforce it as liquidated damages, and allowed the libellant only his proven damages, which were less than the estimated freight; in the second, the court declined to enforce it as a limitation of liability. The penalty was enforceable at law even after 8 & 9 William III, Ch. 11, §8; that statute merely provided that execution should go for only the amount of proved damages. Hence one could always recover his actual damages by suing under a penalty clause, except that he was in that event limited to the amount of the penalty.

However, along with the right to sue under the penalty, ran collaterally the right to sue on the covenant to pay, and it was never held that the penalty affected the right of the covenant in any way. Each ran concurrently, though both could not be used simultaneously, Abbott on Shipping, Part IV, Chap. 2, §2. This was the state of the law while the clause existed in either of its two previous forms, whether as penalty in a stated sum or as penalty for the estimated amount of freight. Yet during that period the
27 penalty clause really added nothing to and subtracted nothing from the promisee's rights. He might sue under either the covenant or the penalty and recover his actual damages in either event, the only difference being that if he foolishly selected the penalty, he was limited by its amount. To add to the penalty clause the words "proven damages" changed nothing whatever; it merely made express what the law imposed in any event. There is therefore not the least reason for supposing that the addition of these words in the charter party was intended to effect a limitation of liability; there was as much ground when the penalty was in a stated sum, to argue that its presence necessarily implied that the parties intended to limit any liability as after the words were added. Yet we see that the courts did not accept that conclusion when the clause was in its earlier form. It seems to follow, therefore, that Mr. Justice Bailhache could not have reached a different result in Wall v. Rederiaktiebolaget, supra, from what he did, without disregarding the whole history of the clause.

It is quite true that the practical result is to reduce the penalty clause to a brutum fulmen, but that result did not arise after the words "proven damages" were inserted; it existed from the time when the penalty would not be enforced at all, except in limitation of one who selected the penalty clause to sue upon. Of course while the practice in debt differed from that in assumpsit, there remained some real distinction, but that has long since disappeared and the clause has persisted as an archaism, such as is common enough in all branches of the law. That the parties should have really intended to limit their liability by any such inartificial and awkward paraphrase beginning with a penalty is unlikely. Such instru-

28 ments are full of formal and time-honored phrases and it is fair to look for some clear intent at so important an innovation. If they meant a limitation they should have been more explicit, Lines v. Atlantic Transport Line, 223 Fed. R., 624.

Besides, the result is most arbitrary if the clause be thought to be in limitation. It does not limit the owner at all, because in no event can he recover more than his freight; it does limit the charterer and by an amount which bears no relation to his loss. Of course the parties might have agreed to limit him, but there is no apparent reason for supposing that such a formal and mechanical equality was within their contemplation. That they should have intended to give the owner an option to repudiate merely because the bargain became very valuable to the charterer is extremely improbable; the owner might have wanted such a result, but the charterer would scarcely have agreed to it, especially in such times as the end of September, 1914.

The last question is of the jurisdiction of this court. If the matter rests in discretion, as I am now bound to hold, I have no hesitation in exercising that jurisdiction in so obvious a case in the interests of justice.

Exceptions sustained; decree for full damages with costs. I assume that the amount of the damages will be settled by agreement.

February 11, 1916.

LEARNED HAND, *D. J.*

29 *Final Decree.*

At a Stated Term of the District Court of the United States, Held in and for the Southern District of New York, at the Court Rooms Thereof in the Borough of Manhattan, City of New York, on the 9th Day of February, 1917.

Present: Hon. Learned Hand, District Judge.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET, Libelant,

against

REDERIAKTIEBOLAGET ATLANTEN, Respondent.

This suit having duly come on to be heard on the pleadings and on exceptions filed by the libelant to articles eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth of the respondent's answer on the ground that the matters therein stated are insufficient in law upon the face thereof to constitute a defense to the libel herein; and said exceptions having been argued by the advocates for the respective parties and due deliberation having been had, and the Court having rendered a decision sustaining said exceptions and directing that the libelant recover its full damages and costs by reason of the matters set forth in the libel; and the damages of the libelant having been fixed by mutual agreement, as appears

by the consent at the foot hereof, without prejudice to the
30 right of the respondent to appeal herein from this decree, at the sum of $35,000, with interest from March 26, 1915;

Now, on motion of Burlingham, Montgomery & Beecher, proctors for the libelant, it is

Ordered, adjudged and decreed that the exceptions filed by the libelant to the answer of the respondent, and each of them, be and the same hereby are, sustained, and that the libelant Aktieselskabet Korn-og Foderstof Kompagniet recover of the respondent Rederiaktiebolaget Atlanten the sum of $35,000, with interest thereon from March 26, 1915, amounting to $3,990, together with $26.30 costs as taxed, amounting in all to the sum of $39,016.30, with interest thereon until paid; and it is further

Ordered that unless this decree be satisfied or an appeal taken therefrom within ten days after the service of a copy thereof with notice of entry on the respondent or its proctors, the sureties on the respondent's stipulation for costs and the sureties on the respondent's stipulation for value cause the engagements of their respective stipulations to be performed or show cause within four days, or on the first day of jurisdiction thereafter, why execution should not issue against their goods, chattels and lands to satisfy this decree.

LEARNED HAND,
U. S. D. J.

The damages of the libelant having been fixed by agreement as above set forth, without prejudice to the right of the respondent to appeal herein, we waive notice of settlement of the foregoing decree.

HAIGHT, SANDFORD & SMITH,
Proctors for Respondent.

Endorsed: Final Decree. Filed Feb. 9, 1917.

31 *Notice of Appeal.*

United States District Court, Southern District of New York.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET, Libelant,

against

REDERIAKTIEBOLAGET ATLANTEN, Respondent.

SIRS: Please take notice that the respondent herein, Rederiaktiebolaget Atlanten, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the final decree herein entered on the 9th day of February, 1917, and from each and every part of said decree.

Dated, New York, March 2, 1917.

Yours, etc.,

HAIGHT, SANDFORD & SMITH,
Proctors for Respondent.

To Alex. Gilchrist, Jr., Esq., Clerk. Messrs. Burlingham, Montgomery & Beecher, Proctors for Libelant, 27 William Street, New York City.

Endorsed: Notice of Appeal. Filed March 5, 1917.

32 *Assignments of Error.*

United States District Court, Southern District of New York.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET, Libelant,
against
REDERIAKTIEBOLAGET ATLANTEN, Respondent.

The respondent-appellant, Rederiaktiebolaget Atlanten, hereby assigns error in the findings, decision and decree of the District Court herein, as follows:

1. In that the Court found as a matter of fact that the respondent did not rely upon Clause 21, the arbitration clause of the charter.
2. In that the Court found as a matter of fact that the arbitration clause of the charter was not intended to apply to a case like the present, where the parties were disputing at the port of loading, as to the owner's right to pay proved damages not exceeding the estimated amount of freight, and thus be excused from performing the voyage.
3. In that the Court held as a matter of law that the arbitration clause of the charter was not binding upon the charterer.
4. In that the Court held as a matter of law that the arbitration clause was a matter of remedy, and not a substantial part of the contract.
5. In that the Court did not refuse to adjudge this controversy on the ground that the charter was made between foreigners, in
33 a foreign country, where the arbitration clause was valid, and that this Court should not assist one of these foreigners to escape the obligations which it had voluntarily entered into.
6. In that the Court took jurisdiction of the case.
7. In that the Court found as a matter of fact that the amount of the limitation of recovery was arbitrary.
8. In that the Court failed to hold, as a conclusion of law, that the libelant should not recover more than its proven damages not exceeding the estimated amount of freight.
9. In that the Court rendered a decree for libelant.
10. In that the Court failed to dismiss the libel herein with costs.

And the respondent-appellant prays that the decree herein may be reversed and that it may be restored to all things which it has lost by reason of said decree.

Dated, New York, March 2, 1917.

HAIGHT, SANDFORD & SMITH,
Proctors for Respondent-Appellant.

27 William Street, New York City.

Endorsed: Assignment of Error. Filed March 5, 1917.

34 *Stipulation.*

United States District Court, Southern District of New York.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET, Libelant-Appellee,

against

REDERIAKTIEBOLAGET ATLANTEN, Respondent-Appellant.

It is hereby stipulated by and between the proctors for the respective parties hereto that the foregoing is a true transcript of the record of the District Court of the United States in the above-entitled cause, as agreed on by the parties.

Dated, New York, April 19, 1917.

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Libelant-Appellee.
HAIGHT, SANDFORD & SMITH,
Proctors for Respondent-Appellant.

35 *Clerk's Certificate.*

United States District Court, Southern District of New York.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET, Libelant-Appellee,

against

REDERIAKTIEBOLAGET ATLANTEN, Respondent-Appellant.

I, Alexander Gilchrist, Jr., Clerk of the United States District Court for the Southern District of New York, do hereby certify that the foregoing is a true transcript of the record of the District Court of the United States in the above-entitled cause as agreed on by the parties.

In testimony whereof I have caused the seal of the said Court to be affixed at the City of New York, this 19th day of April, in the year of our Lord one thousand nine hundred and seventeen, and of the Independence of the United States the one hundred and forty-first.

[SEAL.] ALEXANDER GILCHRIST, JR., *Clerk.*

36 United States Circuit Court of Appeals for the Second Circuit, October Term, 1917.

No. 141.

Argued February 20, 1918; Decided April 10, 1918.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET, Libelant-Appellee,

v.

REDERIAKTIEBOLAGET ATLANTEN, Respondent-Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

Before Ward, Rogers and Hough, Circuit Judges.

Burlingham, Montgomery & Beecher, for Libelant-Appellee.
R. H. Hupper, of Counsel.
Haight, Sandford & Smith, for Respondent-Appellant.
C. B. Smith, of Counsel.

WARD, *Circuit Judge:*

The libel, containing a clause of foreign attachment, alleged that the libellant, for brevity herein called the Korn-og Company,
37 a Danish corporation, chartered the steamer Atlanten of the respondent, for brevity called herein the Atlanten Company, a corporation of Sweden, to proceed to Key West for orders and load a full cargo of oil cake at Galveston, New Orleans or Pensacola for a Danish port or ports. The charterparty was executed at Copenhagen, September 30, 1914. While the steamer was on her way to the United States the respondent wrote from Helsingborg, Sweden, to the libellant at Copenhagen, Denmark, notifying the libellant that it canceled the charter, but was willing to carry on the same Voyage at a much higher rate of freight, there having been a very considerable rise in the market. It stated at the same time that it was willing to pay damages not exceeding the estimated amount of freight under clause 21 of the charterparty, which necessarily included clause 24. The libellant replied that it would hold the respondent under the charter liable for all losses incurred by the breach. The claim was for $44,000.

The answer set up two clauses of the charterparty in defense and averred its readiness to comply with them:

"21. If any dispute arises the same to be settled by two referees, one appointed by the Captain and one by charterers or their agents, and if necessary, the arbitrators to appoint an Umpire. The decision of the arbitrators or Umpire, as the case may be, shall be final, and any party attempting to revoke this submission to arbitration with-

out leave of a court, shall be liable to pay to the other, or others, as liquidated damages, the estimated amount of chartered freight.

* * * * * * *

24. Penalty for non-performance of this agreement to be proven damages, not exceeding estimated amount of freight."

Upon libellant's exceptions to the answer on the ground that it set up nothing constituting a defense in law, Learned Hand, J., entered a decree in favor of the libellant for $39,016.30, the stipulated amount of its damages, with interest and costs.

38 The first question is whether the allegation in the answer, which must be taken to be true, that the agreement to arbitrate was valid and binding by the law of Denmark, where the charter was executed, as well as by the law of Sweden, where the steamer belonged, makes it enforcible here.

This clause cannot be regarded as a condition precedent to the maintenance of a subsequent suit in the courts because it provides that the arbitrators shall "settle", that is, dispose of the dispute. The case, therefore, does not fall within the decisions which hold that agreements such as to ascertain the amount or extent of the claim by arbitration as a condition precedent to a suit in the courts are valid because the question of liability is left to be determined by the courts, Hamilton v. Home Ins. Co., 136 U. S., 242. Under the law of the State of New York, clause 21 is clearly unenforcible because under the decisions of the Court of Appeals it would be held to affect the remedy only and to be contrary to public policy as ousting the courts of their jurisdiction, Meachem v. Railroad Co., 211 N. Y., 346; U. S. Refining Co. v. Trinidad Lake Co. 222 Fed. Rep., 1006. The question being one of general law, the decisions of the Court of Appeals of the State of New York are not binding upon the Federal Courts. It is, however, fair to assume from Hamilton v. Home Insurance Co., 137 U. S., 370, that an agreement like this, which leaves the disposition of the whole matter to arbitration is not a bar to an action in court, even if it may support an action for breach of the agreement. In such a case, when no arbitration has been actually begun and expenses incurred, only nominal damages could be recovered, Munson v. Straits of Dover S. S. Co., 99 Fed. Rep., 787.

We have next to inquire whether clause 24 is a limitation of liability or a penalty. Some such clause has been usual in charterparties from time immemorial and its history is admirably treated by Mr. Justice Bailhache in Wall v. Rederaktiebolaget Luggode (1915) 3 K. B., 66. He shows that it has always been regarded as a penalty and that the addition frequent for some years past of the words

39 "to be proven damages" not exceeding estimated amount of freight do not make it a limitation. Such is the legal meaning of every penalty clause. His construction was expressly approved by the Court of Appeal (1916) 2 K. B. 826 and by the House of Lords in Watts v. Mitsui & Co., Ltd. (1917) A. C. 227. In the Court of Appeal Swinfen Eady, L. J. said:

"There remains the third point. It is contended that, having regard to clause 13 of the charterparty, the general damages recoverable are limited to £3,500, the estimated amount of freight. This clause is a little different from the clause which used formerly to be inserted in charterparties. The old form was 'Penalty for non-performance of this agreement estimated amount of freight.' There is no doubt that in such a case the estimated amount of the freight was a penalty. On proof of the breach judgment could have been recovered for the amount of the penalty, but only as a penalty, and execution would have been limited to the damages which were proved, the judgment only standing as security for such damages. That was the position if the action was brought in respect of the penalty. At the same time the plaintiff would have been entitled to sue for general damages, and he would have recovered whatever damages were proved to have resulted in the ordinary course. In the present charterparty the clause runs thus: 'Penalty for non-performance of this agreement proved damages not exceeding the estimated amount of freight.' It is a form which seems to have been in use for a considerable time, because in Scrutton on Charter-parties, 4th ed., p. 322, published in 1899, the form given is in substantially the same language—'penalty for non-performance of this agreement to be proved damages not exceeding estimated amount of freight due under this charter.' There is a footnote: 'This clause is worthless and unenforceable.' Bailhache, J. was of opinion that the parties here only intended to express in an extended form the effect of the ordinary penalty clause. He thought that the clause was nothing more than the old common form writ large. That is not quite accurate. Under the old form, as I have pointed out, judgment could be recovered for the penalty as such. Under the amended form the plaintiff could not recover judgment for the entire estimated amount of freight as a penalty, because it is not a penalty. The clause says that the penalty is to be the 'proved damages not exceeding the estimated amount of freight.' The proved damages as such cannot be a penalty, because that is the sum which the plaintiff is entitled to recover. The learned judge has, however, given the true explanation of the clause, namely, that the framers of the clause endeavored to state the effect of the old form and they endeavored to improve it. At any rate the clause comes within that head of the charterparty which purports to provide a penalty for non-performance of the charter, and it has no reference to a claim for general damages. Whether or not the clause be meaningless as a penalty clause, it does not limit the amount which can be recovered under the charterparty as general damages. Suppose, for instance an action were brought on the charterparty against the shipowner for breach of the implied condition to supply a seaworthy ship, it might be that the loss would be very great. The action could be brought on the charterparty, although it is usually brought on the bills of lading, and if it were brought effectively on the charterparty it could not be contended that in such a case the damages were so limited. In Elderslie Steamship Co. v. Borthwick, Lord Macnaghton said: 'It is a wholesome rule that a shipowner who wishes to

escape the liability which might attach to him for sending an unseaworthy vessel to sea must say so in plain words.' In my opinion, having regard to the construction of the charterparty as a whole, this clause has no reference to the general damages; it has only reference to the penalty, and it may be that, owing to the language in which it is expressed, where the clause is in this form there is in strict-
41 ness no penalty. It cannot, however, be held to limit the general damages recoverable for breach of contract."

It is of the utmost importance that commercial documents of familiar form going to all parts of the world should as far as possible be understood everywhere in the same way which makes us the more content to follow the English decisions. It the clause be a penalty, the injured party has the right either to sue under it for his damages not exceeding the estimated amount of freight, or to sue for his actual damages under the covenants of the charter-party as the libellant has done in this case.

Even if clause 24 were to be treated as a limitation, we think it would not apply to this case. The respondent does not seek to repudiate the charter, but contends that it authorizes a withdrawal at any time. To us, however, both clauses 21 and 24 seem to contemplate disputed breaches by either party during the performance of the charterparty and not a refusal of either party to perform at all. The fact that the arbitrator for the owners is to be appointed by the captain is strong evidence of this. We find it difficult to believe that the owner was given the privilege of discharging cargo and handing it back to the charterer after it had been loaded, so that it might avail of a higher freight from someone else. No doubt the parties could agree that either might deliberately and for his own interest withdraw entirely from the charter and be responsible for no more than the estimated amount of freight. But if that were their intention they should have expressed it in unmistakable language. We do not think they have done so. The construction seems to us as little reasonable as if a carrier were to say that the familiar clause in bills of lading to the effect that his liability should be limited to a fixed sum or to the invoice value, applied to a deliberate damage, destruction or appropriation of the goods by him.

The decree is affirmed with interest and costs.

42 United States Circuit Court of Appeals for the Second Circuit, October Term, 1917.

No. 141.

AKTIESELSKABET KORN-OG FODERSTOF COMPAGNIET, Libellant-Appellee,

v.

REDERIAKTIEBOLAGET ATLANTEN, Respondent-Appellant.

Argued February 20, 1918; Decided April 20, 1918.

Appeal from the District Court of the United States for the Southern District of New York.

Before Ward, Rogers and Hough, Circuit Judges.

HOUGH, *C. J.* (Concurring):

I entirely agree with the disposition made of clause 24. As to clause 21, it is undeniable that American authority is at present as stated in the court's opinion; whether the rule as given can long survive historical and logical criticism, I venture to doubt. Concurrence as to clause 21, I rest on the plain fact that respondents repudiated their agreement in toto, and thereby debarred themselves from insisting upon any single subordinate part thereof. (Jureidini vs. National &c. Co. (1915) A. C., 499.)

43 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court Rooms, in the Post Office Building, in the City of New York, on the 20th Day of April, One Thousand Nine Hundred and Eighteen.

Present: Hon. Henry G. Ward, Hon. Henry Wade Rogers, Hon. Charles M. Hough, circuit judges.

AKTIESELSKABET KORN OG FODERSTOF KOMPAGNIET, Libellant-Appellee,

v.

REDERIAKTIEBOLAGET ATLANTEN, Respondent-Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with interest and costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. G. W.
H. W. R.

44 Endorsed: United States Circuit Court of Appeals, Second Circuit. Korn Og, etc., v. Atlanten. Order for Mandate. United States Circuit Court of Appeals Second Circuit. Filed Apr. 22, 1918. William Parkin, Clerk.

45 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 44 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Aktieselskabet Korn-og Foderstof Kompagniet, against Rederiaktiebolaget Atlanten, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 9th day of July in the year of our Lord One Thousand Nine Hundred and Eighteen and of the Independence of the said United States the One Hundred and Forty-third.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

46 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Rederiaktiebolaget Atlanten is appellant, and Aktieselskabet Korn-Og Foderstof Kompagniet is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified

by the said Circuit Court of Appeals and removed into the Su-
47 preme Court of the United States, Do Hereby Command You that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the thirty-first day of October, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

48 [Endorsed:] File No. 26653. Supreme Court of the United States, October Term, 1918. No. 567. Rederiaktiebolaget Atlanten vs. Aktieselskabet Korn-Og Foderstof Kompagniet. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 9, 1918. William Parkin, Clerk.

49 Supreme Court of the United States, October Term, 1918.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET, Libelant,

vs.

REDERIAKTIEBOLAGET ATLANTEN, Respondent-Petitioner.

It Is Hereby Stipulated and Consented that the transcript of record now on file in the Supreme Court of the United States shall constitute the return to the writ of certiorari herein.

Dated, New York City, November 6, 1918.

ROSCOE H. HUPPER,
Proctor for Libelant.
JOHN W. GRIFFIN,
Proctor for Respondent-Petitioner.

50 To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Honorable the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York, November 11th, 1918.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

51 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Aktieselsakabet Korn-Og v. Rederiaktiebolaget Atlanten. Return to Certiorari. 567/26653.

52 [Endorsed:] File No. 26653. Supreme Court U. S., October Term, 1918. Term No. 567. Rederiaktiebolaget Atlanten, Petitioner, vs. Aktieselskabet Korn-Og &c. Writ of Certiorari and return. Filed Nov. 29, 1918.

Supreme Court of the United States

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET,
Libelant,

against

REDERIAKTIEBOLAGET ATLANTEN,
Respondent-Petitioner.

Sirs:

PLEASE TAKE NOTICE that upon a certified copy of the record in the above case, the annexed petition, of which a copy is herewith served upon you, and the annexed brief, of which a copy is also herewith served upon you, I shall apply to the Supreme Court of the United States, at Washington, D. C., at the next motion day of said Court, on the 7th day of October, 1918, at the opening of the Court, or as soon thereafter as counsel can be heard, for a writ of certiorari in conformity with the prayer of the petition.

Dated, New York, July 18, 1918.

Yours, etc.,

JOHN W. GRIFFIN,
Counsel for the Petitioner.

To:

Messrs. BURLINGHAM, VEEDER, MASTEN & FEARY,
Proctors for Libelant.

4 SUPREME COURT OF THE UNITED STATES.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET,
Libelant,

against

REDERIAKTIEBOLAGET ATLANTEN,
Respondent-Petitioner.

Petition for Writ of Certiorari.

To the Supreme Court of the United States:

5 The petition of Rederiaktiebolaget Atlanten respectfully shows to the Court:

1. This is a petition for a writ of certiorari to review a final decision of the Circuit Court of Appeals for the Second Circuit affirming a decree of the District Court for the Southern District of New York in an admiralty case.

2. Your petitioner on the 30th day of September, 1914, chartered the steamship *Atlanten* under the common government form of time charter for a voyage from the United States to Danish ports, but with the following clauses added:

6 "21. If any dispute arises the same to be settled by two referees, one appointed by the Captain and one by charterers or their agents, and if necessary, the arbitrators to appoint an Umpire. The decision of the arbitrators or Umpire, as the case may be, shall be final, and any party attempting to revoke this submission to arbitration without leave of a court, shall be liable to pay to the other, or others, as liquidated damages, the estimated amount of chartered freight.

24. Penalty for non-performance of this agreement to be proven damages, not exceeding estimated amount of freight." 7

3. The charter-party will be found printed in the record, page 5. After the making of the charter-party, the conditions of the European War changed. Great Britain first materially modified the principles of International Law in the order in Council of October 29th, 1914. Immediately thereafter the seizure and detention of neutral vessels began. The British proclamation of November 2, 1914, gave "notice that the whole of the North Sea must be considered a military area. Within this area merchant shipping of all kinds, traders of all countries, fishing craft and all other vessels, will be exposed 8
to the greatest dangers, from mines which it will be necessary to lay, and from warships searching vigilantly, by night and by day, for suspicious craft." All vessels were required to enter the North Sea through Dover Strait, and a patrol was kept at both entrances of the North Sea to intercept vessels going to Danish and other ports which were accessible to Germany. Submarine operations did not become common until November, 1914, and the raids of the German fleet and other ferocities upon the British Coast at Scarborough and other places did not begin until December, 1914. These changed conditions forced steamship owners to pay heavy war premiums, and made the charter a very serious 9
loss to the owners. The owner claimed that under Clause 24, above quoted, the parties had agreed that in case of non-performance of the agreement, proven damages should be recovered not exceeding the estimated amount of freight, and offered to pay to the charterer a sum equal to the total amount of the freight which would be earned on the charter-party, and desired to have the question whether it had a right to do so under the charter determined by

10 arbitration. Instead of arbitrating the owner began suit in the United States District Court.

4. As is stated in the ninth article of the answer, page 17, libelant, the charterer, was a Danish corporation; the respondent, the shipowner, a Swedish corporation. The answer states that the charter-party was signed in Denmark and provided for arbitration in case of dispute, and that both by the law of Sweden and Denmark the arbitration clause was binding and was a condition precedent to the right of either party to sue the other (Articles Eleventh and Twelfth, pp. 17, 18).

5. The thirteenth article of the answer printed on
11 page 18 of the record alleges that the respondent has been ready and willing at all times to arbitrate, but that the libelant has failed and neglected to do so, and the fourteenth clause of the answer states that under the law of Denmark and Sweden libelant had no right to bring any libel in any court for, upon or by reason of any matter or dispute set forth or referred to in the libel herein, but was obliged to submit the same to arbitration in accordance with the terms of the charter-party (Record, p. 18).

6. The libelant excepted to the validity of these allegations of the answer.

7. The case involves a question of gravity and
12 of importance in our general jurisprudence. Two foreigners have entered into a valid contract in Denmark, valid both by the law of Denmark and Sweden, where the respective corporations reside, that they will arbitrate disputes arising under the charter-party. The question is whether one of them can make this contract, solemnly entered into, an absolute nullity, by starting a proceeding in the United States Court, a country with which they have no connection.

Your petitioner prays that this Honorable Court 13
may be pleased to grant a writ of certiorari in this cause to the Circuit Court of Appeals for the Second Circuit, to bring up the cause to this Honorable Court for such proceedings therein as shall seem just, and that your petitioner may have such other or further relief and remedy in the premises as to this Court may seem proper and in conformity with the laws of the United States, and your petitioner will ever pray.

REDERIAKTIEBOLAGET ATLANTEN,
Petitioner,

By HAIGHT, SANDFORD & SMITH, 14
Proctors for Petitioner.

JOHN W. GRIFFIN,
Counsel for Petitioner.

15

16 STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

JOHN W. GRIFFIN, being duly sworn, says:

I am a member of the firm of Haight, Sandford & Smith, proctors for the petitioner herein.

I have read the foregoing petition, and the same is true to the best of my knowledge, information and belief.

The reason why this verification is not made by the petitioner is that it is a foreign corporation, and the reason that it is not made by one of its officers is that none of them is within the United States.

This application is made in good faith and not
17 for the purpose of delay.

JOHN W. GRIFFIN.

Sworn to before me this
19th day of July, 1918.

BRENT W. BLYTHE,
Notary Public,
New York County, No. 175.

I DO HEREBY CERTIFY that I have examined the foregoing petition and that, in my opinion, it is well founded and entitled to the favorable con-
18 sideration of this Court.

JOHN W. GRIFFIN.

SUPREME COURT OF THE UNITED STATES.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET,
Libelant,

against

REDERIAKTIEBOLAGET ATLANTEN,
Respondent-Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement.

The leading facts are sufficiently set forth in the petition.

I.

The cases which decide that arbitration agreements are invalid are not legally sound.

There is no legal principle on which an arbitration agreement made by competent persons, without any fraud or undue influence should not be enforced as much as any other contract which they make. It is well known that the only reason why a contrary rule arose in England was that Judges in the early days were paid on the fee system and desired to retain as many cases in the courts as possible. As Lord Campbell said in *Scott* v. *Avery*, 4 H. L. Cas., 811, the rule arose

"in the contests of the courts of ancient times for extension of jurisdiction—all of them being op-

posed to anything that would altogether deprive every one of them of jurisdiction."

In modern times the Courts show no such disposition to extend their jurisdiction. There certainly is no reason why they should wish to nullify contracts between parties to have their disputes disposed of by other tribunals. As a matter of fact, arbitration is continually on the increase. It is being introduced to settle International questions and labor disputes, as well as commercial disputes. Our Stock, Produce and other Exchanges have permanent arbitration boards. That the tendency is to limit cases which refuse to enforce arbitration agreements, not to extend them, appears from *Hamilton* v. *Home Insurance Co.,* 136 U. S., 242, and *Hamilton* v. *Home Insurance Co.,* 137 U. S., 370. In the former case there was a provision in the arbitration contract that the amount of the recovery must be arbitrated, and that such an arbitration was a condition precedent to the bringing of suit. The Court enforced the arbitration agreement. In the latter case there was no such provision and the Court followed previous cases and refused to enforce the arbitration agreement.

II.

The case at bar is distinguishable from most arbitration agreements because it relates to a contract made abroad by citizens of Denmark and Sweden, where such contracts are legally binding.

It is believed that where a contract is made by citizens of the United States in the United States, providing for arbitration, the United States Su-

preme Court should overrule previous cases and hold that such an arbitration agreement is binding. At the present time the New York Produce Exchange has in press a book to show that the cases where the enforcement of arbitration agreements has been refused, have been ill considered and have not been based on any proper legal principle. In the case at bar Judge Hough, speaking in the Circuit Court of Appeals, said:

"As to Clause 21, it is undeniable that American authorities are at present as stated in the Court's opinion. Whether the rule as given can long survive historical and logical criticism I venture to doubt."

The only reason why Judge Hough concurred with the majority was that he considered that the respondents had repudiated their agreement *in toto,* and had thereby deprived themselves from insisting upon the arbitration provision. The majority of the Court, however, points out that this is not the case, and says at the beginning of the last paragraph, page 41 of the record:

"The respondent does not seek to repudiate the charter, but contends that it authorizes a withdrawal at any time."

That is an accurate statement of the owner's position. It does not claim that the charter is not a binding agreement, but, on the contrary, claims that it is, and states that under the charter it is entitled to give up the voyage and make a cash payment instead, and that this question should have been arbitrated pursuant to Clause 21, when the vessel arrived in port, ready to make the voyage, so that the matter could have been quickly disposed of and the voyage made, if the decision were against the owners.

The situation, however, in the case at bar, is not one of overruling American decisions but of refusing to extend a rule which we submit was always unfortunate, so that it shall apply to foreigners in connection with a contract made abroad.

It is one thing to say that under American law, where Americans in the United States made a contract, our Courts will not enforce it, because such a contract was invalid from its inception; and quite another to say that where a valid contract to arbitrate was made in Denmark by a citizen of Denmark, that this Court will refuse to enforce that foreign law and will nullify the provisions of a contract which was absolutely valid and binding upon the parties when made. It is stated in the eleventh and twelfth clauses of the answer that under the law of Sweden and Denmark arbitration was a condition precedent to the right to bring suit (Record, pp. 17, 18). Where arbitration is a condition precedent, it will be enforced (*Hamilton* v. *Home Insurance Co.*, 136 U. S., 242). That a provision for arbitration is a matter of right, not of remedy. See *Hamlyn* v. *Talisker Distillery*, L. R. (1894), A. C., 202. See also *Mittenthal* v. *Mascagni*, 183 Mass., 21.

In this connection it is perhaps sufficient to refer to the language of Mr. Justice Holmes in the case of *Cuba Railroad Co.* v. *Crosby*, 222 U. S., 473, at page 479:

"The extension of the hospitality of our courts to foreign suitors must not be made a cover for injustice to the defendants of whom they happen to be able to lay hold."

III.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN W. GRIFFIN,
Counsel for Rederiaktiebolaget Atlanten.

July 19, 1918.

The Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918

No. 567

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET,
Libellant-Appellee-Respondent

AGAINST

REDERIAKTIEBOLAGET ATLANTEN,
Respondent-Appellant-Petitioner

MEMORANDUM FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

No ground for *certiorari* is shown. The petition shows neither a conflict between circuits nor a conflict with earlier decisions, and the decision of the Circuit Court of Appeals concededly follows the decision of this Court in *Hamilton* v. *Home Ins. Co.*, 137 U. S. 370. It is argued that because the parties are foreigners and because the law of Sweden and Denmark would have required them to submit to arbitration, a different rule should be applied in this case. But whether arbitration shall be enforced is a matter of remedy, governed by the law of the forum, *Meacham* v. *Jamestown F. & C. R. R. Co.*, 211 N. Y. 346;

and there is no proof of the law of Sweden and Denmark, the case having been argued on exceptions. Also, the question is probably moot because the rights of the parties have already been determined by litigation, and arbitration would be useless now. At most the petitioner could only have a claim for damages for the respondent's failure to abide by the arbitration clause, and on that claim its damages would be merely nominal, *Munson* v. *Straits of Dover S. S. Co.*, 99 Fed. 787. Further, the arbitration clause was intended to apply only to disputes which might arise while the charter-party was being performed and not to a situation produced by a repudiation such as is shown by the petitioner's letters of January 8th and January 13th, 1915 (Record, pp. 6-12). When the contract has been repudiated subordinate terms cannot be enforced. In *Jureidini* v. *National British & Irish Millers Ins. Co., Ltd.* [1915] A. C. 499, Lord Chancellor Haldane said, at page 505:

> " Now, my Lords, speaking for myself, when there is a repudiation which goes to the substance of the whole contract I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced."

The same ruling was made by Mr. Justice Pitney in *O'Neill* v. *Supreme Council American Legion of Honor*, 70 N. J. L. 410. In that case the Supreme Council in a benefit certificate issued in 1891 agreed to pay the plaintiff's sister in trust for his six children $5,000 on proof of his death. In 1900 the Council amended its by-laws so that $2,000 should be the highest amount paid on the death of a member on any benefit certificate theretofore or thereafter issued. When the benefit certificate was issued a by-law to which it was subject provided that

"No action at law or in equity shall be brought or maintained on any cause or claim arising out of any membership or benefit certificate, unless brought within one year from the time such action accrues."

The defendant alleged that the plaintiff's cause of action accrued August 20, 1900. The plaintiff accepted the amended by-law as a repudiation of the contract, but did not bring his action until more than one year after the amended by-law went into effect. Justice Pitney said, at pages 422–423:

"When the defendant, on its part, broke the contract, it absolved the plaintiff from the obligation thereof and the action to recover damages for such abrogation is not subject to any limitation that arises solely out of the terms of the contract that has been abrogated."

It is respectfully submitted that the petition should be denied.

New York, August 10, 1918

BURLINGHAM, VEEDER, MASTEN AND FEAREY
Proctors for Respondent

ROSCOE H. HUPPER
Counsel

INDEX.

TABLE OF CASES CITED.

NOTICE OF MOTION.

Supreme Court of the United States

OCTOBER TERM, 1918.

REDERIAKTIEBOLAGET ATLANTEN,
Petitioner,

vs.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET.

No. 567.

Sirs:

PLEASE TAKE NOTICE that upon the annexed petition and brief, I shall apply to the Supreme Court of the United States, at Washington, D. C., at the next motion day of said Court, on the first day of March, 1920, at the opening of the Court or so soon thereafter as counsel can be heard, for leave to intervene herein as *amicus curiae* and to file the accompanying brief, and to be otherwise heard upon

the argument in such manner as the Court deems proper.

Dated, February 20, 1920.

Yours, &c.,

JULIUS HENRY COHEN,
Counsel for the Chamber of Commerce of the State of New York,
111 Broadway,
New York City.

To:

HAIGHT, SANDFORD & SMITH,
Proctors for the Petitioner-Appellant.

To:

BURLINGHAM, VEEDER, MASTEN & FEARY,
Proctors for the Libelant-Respondent.

PETITION FOR LEAVE TO INTERVENE AS AMICUS CURIAE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

REDERIAKTIEBOLAGET ATLANTEN, Petitioner, vs. AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET.	No. 567.

To the Supreme Court of the United States:

The petition of the Chamber of Commerce of the State of New York respectfully shows to the Court:

I. Your petitioner is the oldest commercial or trade body in the United States. Its charter was granted by George the Third, April 5th, 1768, and the act confirming it was one of the first pieces of legislation passed by the State of New York, Chapter XXX, Laws of 1784, passed April 13th, 1784.

II. From its very earliest date, the Chamber has taken an active interest in the arbitration of commercial disputes. During the Revolutionary War and prior to Cornwallis' surrender, while the City of New York was still under martial law, Andrew Elliot, Superintendent-General, wrote (October 2nd, 1781): "As I was and still am of opinion that

Mercantile disputes cannot be adjusted in a more proper or more equitable way than by a reference to respectable Merchants, it gave me great satisfaction when the method was so generally agreed to, and I flattered myself that notwithstanding the trouble it gave individuals, that it would at least continue as long as I had any concern in the Superintendency. I shall be much concerned if these, my expectations, should be disappointed. The present Juncture of Affairs does not seem favorable for any new plans to be adopted. It has long been proposed (I hope Events are not distant that may admit of a Trial) to revive such part of the civil Authority by which justice may be administered to the Community. Individuals will then be freed from the Burthen of adjusting Mercantile disputes, and I shall be relieved from a most fatiguing anxious situation, but I beg you will assure the Chamber of Commerce that in all situations I shall ever retain the highest sense of Assistance and Support they have afforded me."

III. From 1874 down to 1895, the Chamber of Commerce housed the Court of Commerce or Court of Arbitration established by the Legislature of the State of New York in April, 1874, over which court the late Judge Enoch L. Fancher presided. Herein partnership cases, claims for salaries, cases arising on bills of lading, on shipments of goods from abroad, on marine insurance, etc., etc., were submitted to the arbitrator and satisfactorily disposed of.

IV. In 1911 a special committee on commercial arbitration, consisting of the following: James Talcott, Henry Hentz, Frank A. Ferris, Alexander

E. Orr, Charles L. Bernheimer, Chairman, recommended the plan for commercial arbitration which the Chamber put in operation and has since operated with great success. This plan is based upon provisions of the Code of Civil Procedure of the State of New York, permitting voluntary submissions to arbitration and providing for the entry of a judgment upon the award and the enforcement of the judgment as a judgment of a court of record (Chapter 17, Title VIII, of the Code of Civil Procedure, State of New York).

V. In the year 1915 the decision in the case of *U. S. Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.*, 222 Fed. Rep. 1006, which followed the decisions of your honorable court, held it was still the law in this country that a clause in a contract by which parties agreed to submit their differences to arbitration was revocable at the pleasure of either party. This decision came to the attention of the London Court of Arbitration. Shortly after its rendition, the London Court called the attention of your petitioner to the fact that if the decision of Judge Hough in that case were not reversed on appeal or the law changed, "a Citizen of the United States of America would be in the position to enforce an Award in his favour wherever delivered against a British subject, whether resident in England or any British Colony or Dependency * * * whereas, should the Award go against him, he could ignore it." The London Court of Arbitration further reported that "Recourse to arbitration in this Country (England), is very general, and it is a gratifying tribute to the efficiency with which justice is administered in the London Court

of Arbitration, that Foreign Merchants readily assent to the insertion in their contracts of a clause providing for the reference of differences thereto."

VI. Believing that the matter of the irrevocability of contracts, including the irrevocability of an agreement to submit a controversy to arbitration, was a matter vital to the trade and commerce of our country, your petitioner caused to be made a study of the questions of public policy and law involved in the matter, with the idea ultimately of submitting such study as *amicus curiae* to any court in which this question might again arise. This study is now in the form of a publication entitled "Commercial Arbitration and the Law" and was prepared by the counsel for your petitioner.

VII. Your petitioner is advised that there is presented once again for the consideration of this Court upon the appeal herein this question of the irrevocability of an arbitration agreement, arising in this instance out of a clause in a time charter as follows:

> "21. If any dispute arises the same to be settled by two referees, one appointed by the Captain and one by charterers or their agents, and if necessary, the arbitrators to appoint an Umpire. The decision of the arbitrators or Umpire, as the case may be, shall be final, and any party attempting to revoke this submission to arbitration without leave of a court, shall be liable to pay to the other, or others, as liquidated damages, the estimated amount of chartered freight.

24. Penalty for non-performance of this agreement to be proven damages, not exceeding estimated amount of freight."

VIII. Your petitioner respectfully asks leave to file with the Court, for the use of the members thereof, copies of the said publication, "Commercial Arbitration and the Law," for leave to intervene herein as *amicus curiae* and to submit the annexed brief, and, if it please the Court, in view of the grave importance of this subject to interstate and international commerce, that its counsel be heard orally.

All of which is respectfully submitted.

CHAMBER OF COMMERCE OF
THE STATE OF NEW YORK,
By JULIUS HENRY COHEN,
Its Counsel.

February 20, 1920.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

REDERIAKTIEBOLAGET ATLANTEN, Petitioner, vs. AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET.	No. 567.

BRIEF FOR THE CHAMBER OF COMMERCE OF THE STATE OF NEW YORK AS AMICUS CURIAE.

Introduction.

The United States is entering upon a new era in international relationship. The business of its merchants is extending all over the world. Trade is growing with the Latin American Republics, with England, France and all other countries of Europe. The ability to dispose of commercial controversy without litigation is one of the most important factors in the development of trade, for if the merchant is obliged to resort to litigation in order to settle a dispute, he must take account of this contingency in fixing the price for his wares. In consequence, business men all over the world in their dealings with each other earnestly seek to find honorable methods for disposing of con-

troversy without recourse to the courts. The United States finds itself in the unique situation to-day of being practically the only important commercial country which fails to give to contracts for the submission of controversy to arbitration the legal sanction given to all other commercial contracts. The recent Pan-American Financial Congress, held in Washington, through its committee, presented eighteen recommendations for the better facilitating of business between the United States and Latin America, the fifteenth of which reads as follows:

> "15. That the plan of arbitration of commercial disputes in effect between the Bolsa de Commercio of Buenos Aires and the Chamber of Commerce of the United States be adopted by all the American countries."*

The Committee on Law Reform of the New York State Bar Association, in its recent report, made January 16th, 1920, said:

> "The demands of international commerce dictate that this nation should not be behind others, either in honesty or in the facilitation of contracts containing agreements for arbitration of disputes. The jealousy of judicial jurisdiction has led to a historical attitude of the Courts toward arbitration agreements, which is unintelligible at present to the business man. The subject has been the basis of a remon-

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* The agreement between the U. S. Chamber of Commerce and the Bolsa provides for a very simple method of arbitration of disputes arising between merchants in the United States and merchants in the Argentine Republic, by which arbitrators are selected and the controversy disposed of without litigation.

> strance from the London Chamber of Commerce to the Chamber of Commerce of the State of New York. In this day, it does not seem that any good public purpose is subserved by treating arbitration clauses as nullities and unenforcible."

At the Conference of Delegates from the American Bar Association and State and Local Bar Associations, held at Cleveland, Ohio, on the 27th day of August, 1918, the following resolution was adopted:

> "RESOLVED, That the Conference of Delegates of the American Bar Association and of State and local bar associations hereby recommends that the various State and local bar associations of the United States co-operate with individuals, State and local Chambers of Commerce and other organizations in the prevention of unnecessary litigation along the following lines:
>
> * * * * * *
>
> 4. *By encouraging and by making known the fact that they are encouraging the settlement of disputes out of court as far as practical,* and
>
> 5. By urging the bar and business men generally to pull together in each locality for the prevention of unnecessary litigation.
>
> * * *"

Believing that the time is ripe for a careful reconsideration of the state of the law upon the subject, we respectfully bring to the attention of the court the following points: (For the sake of brevity we shall refrain so far as possible from repeating the text and citations in the book, "Commercial Arbitration and the Law," and shall, for

the purposes of this brief, assume that permission will be granted to file copies of the book for the use of the court, and that free reference thereto may be made herein.)

Synopsis of the Argument.

We believe that we shall be able to sustain, without much difficulty, the proposition that *agreements for the submission of commercial controversies to arbitration are not against public policy, but that, on the contrary, public policy favors them.* We believe, too, we shall be able, without much difficulty, to convince the court that *such agreements should be encouraged by the law;* that the reason for the rule of revocability is not sound, and that, as the late Charles F. Southmayd said in arguing before the New York Court of Appeals in 1872 (*Delaware & Hudson Canal Co.* v. *Pennsylvania Coal Co.*, 50 N. Y. 250, page 2 of Mr. Southmayd's printed argument): "if at any time within the last fifty years (1822-1872) the question would have been presented as a new one to the courts, no such doctrine would have been established." Even then it was, as he said, "upheld purely on the principle of *stare decisis.*" And, as Judge Hough said in deciding *U. S. Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.*, 222 Fed. Rep. 1006, there is nothing save *stare decisis* to support the rule. (Judge Hough said that he failed to find any reason for "refusing to give effect to the agreements of men of mature age, and presumably sound judgment," and he regarded the plaintiff's action in refusing to carry out the provisions for arbitration as "this libelant's contract breaking." The rule, however,

could not be changed, he said, by the lower court, and until changed by the United States Supreme Court itself "must be obeyed * * * even though inferior courts fail to find convincing reasons for it.") We believe that we shall find little difficulty, also, in convincing the court that the rule *is unsound in law;* that is to say, that it is unsound as a matter of principle and theory, and that also it is *not sustained* by authority; in short, that it is not even sustained by *stare decisis.* We believe we shall be able to satisfy the court that the English law upon the subject is not now as it has been generally understood by American courts to be, and that the English courts have themselves corrected what they now regard as *judicial error.* The failure upon the part of American courts to effectuate the same result in American law has been due wholly to the fact that the matter has not been freshly considered in the light of later study upon the subject. We say with candor that we apprehend our greatest difficulty will be in persuading the court that *the rule should be modified by judicial action rather than by legislation,* and since we regard the latter as the more difficult of the points upon which to persuade the court, we shall go at once to it.

I.

If the Court should be convinced that public policy favors agreements for the submission of commercial controversy to arbitration and that the rule of revocability rests neither in reason nor in sound precedent, the Court should correct the error.

We respectfully direct the attention of the court to our consideration of this subject in Chapter IV,* wherein is discussed the rule of *stare decisis* and the theory for departing from it. *"Cessante ratione legis cessat ipsa lex."* We should like to bring once more to the attention of the court the words of Chief Justice Taney in *The Genesee Chief* v. *Fitzhugh,* 12 Howard 443, in which this court completely reversed its previous decision in *The Steam-Boat Thomas Jefferson,* 10 Wheaton 428 (1825). Said that learned justice:

> "It is the decision in the case of the Thomas Jefferson which mainly embarrasses the court in the present inquiry. We are sensible of the great weight to which it is entitled. But at the same time we are convinced that, if we follow it, we follow an erroneous decision into which the court fell, when the great importance of the question as it now presents itself could not be foreseen; and the subject did not therefore receive that deliberate consideration which at this time would have been given to it by the eminent men who presided here when that case was decided. For the decision was made

* Page 39 *et seq.*, "Commercial Arbitration and the Law."

> in 1825, when the commerce on the rivers of the west and on the lakes was in its infancy, and of little importance, and but little regarded compared with that of the present day" (p. 456).

We should like, also, to bring to the court's attention the decision by the New York Court of Appeals, reversing itself upon the important subject of the constitutionality of the Bulk Sales Law. (*Klein* v. *Maravelas,* 219 N. Y. 383, reversing *Wright* v. *Hart,* 182 N. Y. 330.) Judge Cardozo said:

> "We think it is our duty to hold that the decision in *Wright* v. *Hart* is wrong."

Likewise, the decision of that court in *People* v. *Charles Schweinler Press,* 214 N. Y. 395, reversing *People* v. *Williams,* 189 N. Y. 131, in which the court said:

> "There is no reason why we should be reluctant to give effect to new and additional knowledge upon such a subject as this even if it did lead us to take a different view of such a vastly important question as that of public health or disease than formerly prevailed."

(We would urge that the matter of international commerce is likewise a "vastly important question.") This court itself admonished the Bar in *Rosen* v. *United States, Pakas* v. *United States,* 245 U. S. 467, "that the dead hand of the common-law rule of 1789 should no longer be applied to such cases as we have here" and that the question then before the court must be examined "'in the light of general authority and of *sound reason*'"

(italics ours). Many other authorities of similar import will be found in Chapter IV. We cannot refrain, however, from quoting the language of the Kansas Supreme Court in *Thurston* v. *Fritz*, 91 Kansas 468, wherein it reversed *State* v. *Bohan*, 15 Kansas 407:

> "We are confronted with a restrictive rule of evidence commendable only for its age, its respectability resting solely upon a habit of judicial recognition, formed without reason and continued without justification. The fact that the reason for a given rule perished long ago is no just excuse for refusing now to declare the rule itself abrogated, but rather the greater justification for so declaring; and if no reason ever existed, that fact furnishes additional justification."

Let us examine for a moment the nature of the rule now under consideration. It is not a rule of property. It does not affect title to real estate. It relates solely to the matter of remedy. The parties having agreed that controversy between them should be submitted to arbitration, the courts have declared that they may repudiate this part of the contract, however much they may observe the other provisions of the contract. If the court should now find, in the light of more complete understanding of the reasons of public policy involved, that such repudiations should not be permitted, it will, in effect, do no more than to sanctify the entire contract of the parties. It may very well be that fully to effectuate the contract will require legislative change, but this furnishes no reason why the court should not itself correct an error resulting wholly from judicial decision.

The theory of the common law is nowhere better expounded than by Mr. Justice Holmes in "The Common Law" (pp. 35-36). When

> "administered by able and experienced men, who know too much to sacrifice good sense to a syllogism, it will be found that, when ancient rules maintain themselves in the way that has been and will be shown in this book, new reasons more fitted to the time have been found for them, and that they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted."

Also (p. 41):

> "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."

And, lastly, we would refer to the expression of Mr. Justice Lurton with reference to the rigor with which the rule of *stare decisis* should be applied (*Hertz* v. *Woodman*, 218 U. S. 205, at p. 212—italics ours):

> "The Circuit Court of Appeals was obviously not bound to follow its own prior decision. The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is *not inflexible*. Whether it shall be followed or departed from is a question entirely within the *discretion* of the court, which is again called upon to consider a question once decided."

II.

The rule of revocability is against sound public policy.

The discouragement of litigation has always been regarded as sound public policy. Upon the canons of ethics for the conduct of the Bar printed and distributed by the American Bar Association appears the following quotation from Lincoln:

> "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man."

In 1914 the New York State Bar Association created the Committee on Prevention of Unnecessary Litigation. That committee, in an exhaustive report, referred to the system of commercial arbitration existing under the rules of the Chamber of Commerce of the State of New York, proposed the establishment of a similar system by the State Bar Association, and at the 1916 session of the New York State Bar Association was authorized to negotiate with the Chamber of Commerce for the adoption of "Rules for the Prevention of Unnecessary Litigation." These rules appear in Appendix A to the book. Under the heading "Prevention of Litigation After the Facts Become Fixed and Before Suit," this body of lawyers gives the following advice:

> "After the facts upon which a dispute can be based have become fixed, either before or

after a dispute has arisen, it is possible to do much to prevent litigation. What can best be done in each case and whether with or without legal advice, necessarily depends upon the facts and the parties to the prospective controversy. Differences may be minimized, adjusted or arbitrated. If not so disposed of, litigation will usually ensue."

Arbitration.—"Where differences cannot be adjusted between the parties or their attorneys and the intervention of a third party becomes necessary, there are several forms which arbitration may take. The arbitration may be (1) informal, (2) under the Code, (3) under the auspices of a commercial body, or (4) under the auspices of a bar association.

"The experience of many business men and lawyers testifies to the advantage of these methods of adjusting differences wherever possible. They are inexpensive, speedy and peaceful."

It may fairly be said that it is the modern opinion of the Bar of this country, as well as the almost unanimous opinion of business men, that the arbitration of commercial disputes is in the direction of discouraging litigation. But it does more than discourage litigation. It disposes of differences without creating hatred. It enables business men to settle their differences without becoming bad friends. It offers the way out for honorable men to yield without offense to or loss of their pride. Not only does it economize in the direction of avoiding the cost of the litigation itself, but it economizes in the saving of the time of business men and in the avoidance of the friction that might otherwise come about. In Chapter III will be found a review of the public opinion of the past and in other coun-

tries upon this subject. Morse, writing on "Arbitration and Award," says:

> "The tendency among business men to avoid the public tribunals and to settle their disputes by arbitration before individuals of their own choosing is growing stronger year by year. Not unnaturally they feel that they can obtain a more intelligent and satisfactory, as well as a more prompt, determination from eminent lawyers or merchants whom they select, and in whom they feel confidence, than they can venture to expect from an average jury" (Preface, p. iii).

Among the Romans, in Scotland, Denmark, in the old Hebrew State, in Ireland, Holland—all over the world there seems to be a body of experience and fact justifying this confidence in arbitration as a measure for preventing litigation. Perhaps nowhere is to be found a better description of its effectiveness than that by Coleridge, J., in Note 14 to 3 *Blackstone's Commentaries,* page 17:

> "Excellent as trial by jury undoubtedly is as a means of investigating the truth, yet there are cases to which, for various reasons, it is not applicable. Thus when long and complicated accounts are to be examined, it can hardly be expected that twelve men placed at hazard in the jury-box should be able to determine very accurately upon the allowance of particular items, or to strike a nice balance between the contending demands. Again, it will often happen that two persons lay claim to the whole of the same thing as a matter of mere right, which, under proper regulations, might very well suffice for both, and of which it might be ruinous to either to be wholly deprived, as a stream of water, yet in such case the verdict of the jury can only determine to whom

the right belongs, it cannot look to the consequences nor make a beneficial division of the use between both. In this way (arbitration) the parties have the benefit of a more deliberate investigation; if the matter be of a scientific nature, or removed from the common information of men, they may select someone to decide it whose habits have made him conversant with it, and by investing him with more or less power, they may have a decision more single and unbending than that of the law, prospective in its operations, and limiting in detail the future exercise of disputed rights."*

III.

The doctrine of revocability is based upon judicial error.

As Part II of the book is devoted to the exposition of this point, we shall do no more than to summarize briefly the results of that review. The English common law was not opposed to arbitration. On the contrary, it encouraged arbitration. The decision in *Vynior's Case* by Lord Coke is not really a decision against arbitration. Upon analysis, it is found to rest wholly upon the fact that in that case there was involved a bond conditioned for the faithful performance of an agreement to arbitrate. One of the parties revoked the authority of the arbitrator and suit was brought upon the bond. Notwithstanding the revocation, the bond was enforced. The famous quotation of Lord Coke, upon which rests the alleged doctrine of revoca-

* This note cannot be found in the American editions, but is given as quoted by Billing, "Law of Awards," pages 16 and 17.

bility, upon analysis is found to be only a dictum long since repudiated in the English common law.*

It was not consonant with earlier decisions upon the subject, nor with later ones, and for many, many years in England has not been treated as authority. In theory, the doctrine rested upon the conception that the arbitrator was in some fashion the agent of the party and that the principle of revocability of the agent's authority applied to arbitrations. But for many years the idea that the arbitrator was anything less than a judge has been repudiated. The many cases to be found in the Year Books (see Chap. IX), earlier precedents contra to Coke's dictum, the effect of Coke's dictum upon the law, the refusal to follow it by other distinguished jurists (see Chap. XI) seem to indicate that only a careful review of the authorities was necessary to make clear that the Bar and the Bench had been led astray for many years, and that a mere *obiter dictum* by process of repetition had become a doctrine of the law; that in truth, so long as the law permitted recovery of penalties, the bond accompanying the arbitration agreement was adequate protection to the parties (see Chap. XII, p. 148), but with the passing of fines and penalties (Chap. XII) the adequate remedy disappeared, leaving the dictum surviving. It may be said in passing that the reasoning supporting Coke's dictum in the *Vynior Case* is much more understandable in the light of the strict formality of pleadings prevailing in his day and much more sympathetically received by analytical students than the alleged doctrine based upon "ousting the courts of jurisdiction" (see Chap. XIII). This

* Ch. XVI, p. 208.

alleged doctrine rests upon very little, if any, reasoning, and upon no real authority. For Lord Kenyon's decision in *Halfhide* v. *Fenning,* 2 Brown's Chancery Cases 336 (1788), is still the law. The rule of *Kill* v. *Hollister,* 18 Geo. II 1746, 1 Wils. 129, is disposed of in 1855 in the House of Lords in *Scott* v. *Avery,* wherein Mr. Justice Coleridge says:

> "I certainly am not disposed to extend the operation of a rule which appears to me to have been founded on very narrow grounds, directly contrary to the spirit of later times, which leaves parties at full liberty to refer their disputes at pleasure to public or private tribunals" (5 H. L. C. 811, at p. 843).

Even in 1856 the spirit of the English courts was to leave "parties at full liberty to refer their disputes at pleasure to public or private tribunals." Lord Chancellor Cranworth, who presided at the trial of *Scott* v. *Avery* in the House of Lords, and who, as Lord Coleridge later said, was "no mean authority," presided the same year in the House of Lords in *Drew* v. *Drew,* and in that case, referring to the doctrine that either party might at any time revoke a submission to arbitration, said:

> "That was an inconvenient, and, I think I may be allowed to say, an irrational state of the law. * * * I say that was an absurd state of the law, which has since been rectified, and now the law may be represented as being that neither party to a submission can stop an arbitration pending its proceedings without first obtaining the sanction of some Court of Westminster Hall, or of one of the Judges, for so doing" (2 Macq. Reports [H. of L.] 1, pp. 3, 4, March, 1855).

In 1856, in *Russell* v. *Pellegrini,* 6 Ellis & Blackburn 1020, Lord Campbell, who also sat in *Scott* v. *Avery,* said:

> "Somehow the courts of law had in former times acquired a horror of arbitration; and it was even doubted if a clause for a general reference of prospective disputes was legal. I never could imagine for what reason parties should not be permitted to bind themselves to settle their disputes in any manner on which they agreed. The decision in *Scott* v. *Avery,* that an agreement that there should be a reference before the party should be at liberty to sue might be so made as to be binding, was a very wholesome decision" (pp. 1025, 1026).

And in 1859, Baron Martin, who was reversed by Lord Cranworth and Lord Campbell in *Scott* v. *Avery,* says: "*Scott* v. *Avery has overruled all* the previous decisions on the subject." "Lord Campbell certainly held that an agreement to refer any dispute to arbitration is binding, and that no action can be maintained until after an adjudication by the arbitrator." And "I think that the decision in *Scott* v. *Avery* cannot be upheld unless the judgment of Lord Campbell is right." And Baron Martin says: "*Scott* v. *Avery* was nothing more than the case of a policy of insurance, with a clause that, in the event of any difference between the underwriters and the insured, it should be referred to arbitration. Lord Campbell certainly held that an agreement to refer any dispute to arbitration is binding, and that no action can be maintained until after an adjudication by the arbitrator. It seems to me," says the Baron further, "that *Scott* v. *Avery* has overruled all the previous de-

cisions on the subject." He is of opinion, therefore, that "If parties choose to arrange that, before any action is brought on a policy of insurance, an arbitrator shall ascertain the sum to be paid," that seems to him "only a circuitous mode of saying that no action shall be brought" (*Horton* v. *Sayer*, 4 H. & N. 643, at p. 650).

It is true that during the period from 1855 down to 1887 the English decisions seemed to be in a state of confusion. But by 1856, Lord Chancellor Cranworth and Lord Campbell in *Scott* v. *Avery* (1855-1856), Lord Chancellor Sugden in *Dimsdale* v. *Robertson* (1840), Lord Eldon in *Waters* v. *Taylor* (1807-1808) and in *Harcourt* v. *Ramsbottom* (1820), Lord Kenyon in *Halfhide* v. *Fenning* (1788), Baron Jeffreys in *Norton* v. *Mascall* (1685), Sir Henry Montague in *Browne* v. *Downing* (1620), Yelverton and Laken in 8 Edw. IV, 9 and 10 (1468), the entire bench in *Brode* v. *de Ripple* (1375), the entire bench in 1389 and the Judges during the reign of Henry III (1216-1272) all had agreed upon what may be paraphrased as follows:

"Mutual promise to abide by the award of certain men is good enough to bind them to abide by the agreement"; * * * "it is fit that the same should be performed." If either revokes, he has done something "bad in equity." "Public policy requires that effect should be given to such contracts," and that the parties should be left "at full liberty to refer their disputes at pleasure to public or private tribunals." Parties may select any means they choose for determining upon what basis they shall release each other, or what shall be due one from the other, and arbitration is a convenient, inexpensive and desirable means for

accomplishing such a result. He who cancels his obligation so to arbitrate is guilty of inequity and is not deserving of the aid of a court of equity.*

By 1887, the dictum in *Vynior's Case* had entirely disappeared. The doctrine of ousting the courts of jurisdiction had been repudiated, and in equity Lord Eldon's view prevailed. *If the parties agree to resort to arbitration, they should go to arbitration. If they do so, the courts will not set aside the award, save upon grounds of equity.* (Chapter XVI, p. 207.) In 1892, by clear analysis of the English judges themselves, not by act of Parliament, the error in the development of the English common law becomes visible and is corrected in the case of *Hamlyn & Co.* v. *Talisker Distillery,* 21 Session Cases (4th Series), 21 (see Chapter XVI, Correction of a Judicial Error, p. 208) and in *Caledonian Insurance Co.* v. *Gilmour,* L. R. [1893] App. Cas. 85, in *Trainor* v. *Phoenix Fire Assurance Company,* 65 L. T. R. 825, in the Queen's Bench Division, wherein Lord Coleridge himself said that

> "*Scott* v. *Avery* is a case to show not that the jurisdiction of the courts has been or can be ousted, as has been sometimes suggested, but that you do not oust the jurisdiction of the court, and do not come within the authority of the earlier cases * * * because you refer the question of liability, as well as the question of amount; and one of the judges, I think in the Exchequer Chamber, certainly in the House of Lords, points out that for the ascertainment of the amount of liability it must often be essential to go into the principal question of liability it-

* Chap. XVI, p. 205 *et seq.*

> self, and to ascertain not only whether the liability exists to any extent, but also whether it exists at all, and, although that must be so in many cases, nevertheless, it has never been suggested that the jurisdiction of the courts was ousted."

In the last decade of the century, under a general provision in articles of co-partnership for arbitration of all matters in difference between them, an arbitrator has power even to award a dissolution of the partnership. *Walmsley* v. *White,* 40 W. R. 675 (1892), reversing *Joplin* v. *Postlethwaite,* 61 L. T. R. 629, and following *Russell* v. *Russell,* L. R. 14 Ch. D. 471, 28 W. R. Dig. 154; *Vawdrey* v. *Simpson* (1895), per Chitty, J., 65 L. J. (Ch.) 369, L. R. (1896) 1 Ch. 167, 44 W. R. 123; *Belfield* v. *Bourne,* 8 R. 61 (1894), L. R. [1894] 1 Ch. 521, 63 L. J. (Ch.) 104). In *Belcher* v. *Roedean School Site and Buildings Limited,* 85 L. T. R. 468 (1901), decided in the Court of Appeal, the arbitrator is the architect for one of the parties. Collins, M. R., says:

> "It is nothing unusual for the parties to a building contract knowingly to submit their differences to an arbitrator who is not, and is not expected to be, absolutely unbiased. In these cases, where the builders dispute what the architect has done, they will *ex hypothesi* think that the architect is in the wrong, and, perhaps, so grossly wrong, as to be even fraudulent. But is the mere fact of such a dispute to be allowed to rescind the terms of the agreement, and oust the jurisdiction of the architect, the arbitrator agreed on by the parties? Certainly not."

One of the interesting changes observable is that at this point in the evolution of the law the court is jealous of *ousting the arbitrator of jurisdiction.*

> "Can one of two parties, by making the most injurious charges against the arbitrator, charges which in this case * * * are founded on very scanty materials, at once oust his jurisdiction?" "To hold that," says the Master of the Rolls, "would open a wide door for all sorts of attempts to get rid of arbitrators deliberately chosen by the parties to contracts, and to avoid stipulations for the prompt decision of disputes by named persons chosen because they are instructed and informed, on whose decision one party is entitled to insist, and to whose decision the other is bound to submit, unless he can show some real bias on the part of the arbitrator which was not contemplated when he was chosen."

In 1893, Lord Chancellor Bowen says in *Jackson v. Barry Railway Co.,* L. R. [1893] 1 Ch. D. 238, at page 247:

> "It is no part of our duty to approach such curiously-coloured contracts with a desire to upset them or to emancipate the contractor from the burden of a stipulation which, however onerous, it was worth his while to agree to bear. To do so, would be to attempt to dictate to the commercial world the conditions under which it should carry on its business."

And by 1903, in *Austrian-Lloyd Steamship Co. v. Gresham Life Assurance Society, Lim.,* 72 L. J. (K. B.) 211, a policy of insurance which provides that

> "all the parties interested expressly agree to submit to the jurisdiction of the Courts having jurisdiction in such matters of Budapest"

is held to be a submission to arbitration binding upon the courts of England, Romer, L. J., saying:

> "It is not as if the insurance company alone merely agreed to submit themselves to the jurisdiction of the Courts at Budapest. Here both the parties to the contract have mutually agreed to submit. If the parties, instead of agreeing to submit all disputes that might arise under the contract to the Courts at Budapest, had agreed to submit them to a named arbitrator, there could not possibly be any doubt that the person named was the arbitrator to decide any disputes. I think the meaning here is the same."

Finally, in 1907, Holmes, L. J., in *Gaw* v. *British Law Fire Insurance Co.* (1908), 1 I. R. 245, says, discussing the effect of *Scott* v. *Avery:*

> "It will not be denied that that decision legalizes a stipulation in a contract that any difference as to the amount of liability thereunder is to be referred to arbitration, and that no action can be maintained until the amount is so settled, and then only for such sum as shall be awarded. Speaking for myself, however," says he, "I have always been of opinion that *Scott* v. *Avery* went farther than this, and is an authority that a contract may legally provide that where a difference arises thereunder relating to other matters than amount, no liability is to arise, and no action is to be maintained until the matter of difference has been made the subject of arbitration and award. This," says the learned judge, "has been not only my

opinion, but is, I think, the view generally taken by lawyers during the last forty years."

He quotes Martin, B., in *Tredwen* v. *Holman* and disapproves of Brett's dictum in *Edwards* v. *Aberayron Mutual Ship Ins. Society.* He says:

"Lord Esher, then Brett, J., distinctly, and Kelly, C. B., with more doubt, took the narrow view of *Scott* v. *Avery* on which Mr. Justice Ross has acted. It must however, be remembered that in doing so they not only differed from the majority of the Exchequer Chamber, but from the three judges of the King's Bench. The *Aberayron Case* has, as far as I am aware, been only referred to in one subsequent English case, *Trainor* v. *The Fire Insurance Co.,* in which Lord Esher's view of the effect of *Scott* v. *Avery* was dissented from; and in *Scott* v. *Mercantile Acc. & Guarantee Ins. Co. Limited* Lord Esher himself gave a judgment absolutely inconsistent with his dicta in the *Aberayron Case.*"

Lord Justice Holmes then quotes with approval Lord Watson's words in *Caledonian Ins. Co.* v. *Gilmour* regarding the principle of *Scott* v. *Avery.* Accordingly, Judge Ross is reversed. The holding is that even an issue of *fraud* must be left to arbitration. Lord Cranworth's interpretation of *Scott* v. *Avery* becomes the effective rule of law. In 1914 there arises in Admiralty the *Cap Blanco* case, involving a clause in a bill of lading providing that any disputes "are to be decided in Hamburg according to German law." The court says:

"In dealing with commercial documents of this kind, effect must be given, if the terms

of the contract permit it, to the obvious intention and agreement of the parties. I think the parties clearly agreed that disputes under the contract should be dealt with by the German tribunal, and it is right to hold the plaintiffs to their part of the agreement. Moreover, it is probably more convenient and much more inexpensive, as the disputes have to be decided according to German law, that they should be determined in the Hamburg court."

(*The Cap Blanco,* 83 L. J. [P.] 23 [1913]; 109 L. T. R. 672; 29 T. L. R. 557. Evans, P. Appeal withdrawn. *See* 83 L. J. [P.] 23. C. A.) And in 1913 the Privy Council, in an appeal from Canada, holds that: "When an arbitration for any reason becomes abortive, it is the duty of a court of law, in working out a contract of which such an arbitration is part of the practical machinery, to supply the defect which has occurred. It is the privilege," note the word, "of a court in such circumstances and it is its duty to come to the assistance of parties by the removal of the impasse and the extrication of their rights." "This rule," says Lord Shaw, delivering the judgment of their Lordships, "is in truth founded upon the soundest principle" (note that he does not rest it upon Parliamentary legislation), "it is practical in its character, and it furnishes by an appeal to a court of justice the means of working out and of preventing the defeat of bargains between parties." And now (1913) his Lordship believes: "It is unnecessary to cite authority on the subject, but the judgment of Lord Watson in *Hamlyn & Co.* v. *Talisker Distillery* might be referred to." The question before the Lords, says his Lordship, "went in

principle to the incapacity of a court of law to effectuate justice, by itself undertaking a duty to supply a defect which had occurred in the prescribed mode of ascertaining the rights of parties." (*Cameron* v. *Cuddy*, [illegible] R. [1914] A. C. 651, at pp. 656, 658.) This latter decision is not based upon the Arbitration Act of England of 1889; it is a mere consequence of the sound application of the principles of the common law. In the recent case of *Bright* v. *Gibson*, 32 T. L. R. 533, May, 1916, there came before King's Bench a contract containing the following clause:

> "Any dispute on the contract to be settled by arbitration in the usual manner, for which purpose it may be made a rule of court."

One of the parties was a firm of cotton-spinners and the other was a firm of chemical manufacturers. Owing to war conditions, a dispute arose concerning the furnishing of a supply of Epsom salts. Under the arbitration clause, the chemical manufacturers named a Mr. Heap as their arbitrator and delivered a notice to the cotton-spinners calling upon them to name their arbitrator. Upon failure to name another arbitrator, Mr. Heap notified the parties to attend before him and the cotton-spinners refused to attend. Mr. Heap proceeded without them and awarded the chemical manufacturers all they claimed. Then counsel for the cotton-spinners made application to the court to set aside the award upon the ground that, the arbitration not having been had in accordance with the Arbitration Act of 1889, it was invalid, inasmuch as under that act there should have been a reference to a sole arbitrator named by both parties jointly, or, in default

of agreement, to an arbitrator appointed by the court under Section 5 of the act. "The phrase 'in the usual manner,'" argued Mr. du Parcq, "must mean 'in accordance with the law of the land.'" On the other hand, the respondents claimed that the phrase meant "according to the custom of our particular trade." Mr. Justice Rowlatt (Rowlatt and Sankey, JJ.) delivers the judgment. The court refuses to accept the interpretation that "in the usual manner" means, as a matter of law, "in accordance with the Arbitration Act, 1889." "The court did not think that that was so. They thought that the clause referred to 'the habitual form of arbitration adopted in fact.'" The applicants were given opportunity to show what the habitual form was, but their application to set aside the award was denied.

In *Smith, Coney & Barrett* v. *Becker, Gray & Co.* (1916), 2 Ch. 86, a case arose upon the following facts: "S., C. & B. had made contracts to purchase beet sugar to be delivered f. o. b. at Hamburg in August, 1914. On July 31, 1914, the German Government placed an embargo on the export of beet sugar. S., C. & B. contracted with B., G. & Co., neither party knowing of the embargo, to sell to them sugar to be delivered at Hamburg. This contract incorporated the rules of the Sugar Association of London, including a war clause whereby in the event of a German war contracts were to be deemed to be closed and were to be referred to the Sugar Association Council, and provisions for arbitration." It was held that the parties were bound by the arbitration clause and that Becker, Gray & Co.'s proceedings under that clause ought not to

be restrained.* In *Produce Brokers Co., Lim.*, v. *Olympia Oil and Cake Co.* (No. 2), 85 L. J. (K. B.), 160, decided in the House of Lords by Earl Loreburn, Lord Atkinson, Lord Parker, Lord Sumner, and Lord Parmoor, the contract contained an arbitration clause which provided that "All disputes

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*The rules of arbitration of the Sugar Association are as follows:

"Rules relating to the Clearing Contract. Arbitration and Legal.

"351. Every form of contract printed or issued by or with the authority of the clearing department of the association shall be deemed to incorporate all the rules of the Sugar Association of London, clearing department, and shall contain a clause in the following form, viz.: The above mentioned rules, regulations and by-laws are incorporated in this contract, as fully as if the same had been expressly inserted herein, notwithstanding either or both of the parties to it be not a member or members (as the case may be) of the association. The committee is the referee of all disputes.

"352. Any disputes that may arise out of or in relation to any clearing contract, or out of or in relation to any alleged contract, circle, filière, bill of lading, warrant, or any other dealing or matter contemplated by the clearing rules, whether any such circle or filière has from whatever cause been interrupted or broken or not, and whether the members of the clearing department, or the parties to the contract between whom the dispute arise, are mutually contracting parties or not, shall be referred to the committee.

"353. Such submission or reference shall be in writing and shall be deemed to incorporate a provision for its being made a rule of any of the divisions of His Majesty's High Court of Justice in Ireland; and for the same, as well as the decision or award to be made in pursuance thereof, being registered for execution in the Court of Session in Scotland on the application of either contracting party, for the purpose of enforcing an award against a party residing or carrying on business in Ireland or Scotland respectively. Neither buyer, seller, trustee in bankruptcy, nor any other person claiming under either of them, shall bring any action against the other of them in respect of any such dispute until such dispute has been settled in accordance with the provisions of rule 352, and it is expressly agreed that the obtaining an award shall be a condition precedent to the right of either contracting party to sue the other in respect of any claim arising out of any such contract.

"354. Neither buyer, seller, trustee in bankruptcy, nor any other person as aforesaid, shall require, nor shall they apply to the Court to require, any referee, arbitrator, or umpire, to state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference, but such question of law shall be determined by arbitration in manner herein directed."

* * * arising out of this contract * * * shall be referred to arbitration according to the rules endorsed on this contract." "By such rules it was provided that the reference should be to two arbitrators, one to be appointed by each party, and an umpire, whose decision in case of disagreement should be final, and in case either party should be dissatisfied with the award, an appeal should lie to the committee of appeal of the Incorporated Oil Seed Association." In this case Earl Loreburn, at page 163, said:

> "Parties have a right to prefer what some may consider the imperfect, though expeditious, wisdom of arbitrators to the slower and more costly justice of His Majesty's Courts" and that the arbitral committee "had jurisdiction finally to find as they did in regard to the custom of trade * * * There is no magic in a custom that an issue as to its existence should be treated differently from any other issue of fact before an arbitral tribunal. *With all respect, it seems to me that a Court plainly usurps the function of an arbitrator when it claims a right to decide that issue for itself on a submission such as we find here.*" (Italics ours.)

In this case Lord Sumner says at page 169:

> "During the last thirty or forty years most wholesale trades dealing in imported produce have formed trade associations, adopted standard forms of contract which are invariably used, and created arbitral tribunals, formed exclusively of members of the association, which yearly settle thousands of trade disputes to the satisfaction of the trade. Arbitration clauses, substantially the same as that before your Lordships, are characteristic of all these forms of contract. The sys-

> tem has been devised by mercantile men to suit their needs, and they have found it highly beneficial; they have been naturally anxious to establish trade control over the transactions of the trade as completely as possible."

In *Clough* v. *County Live Stock Insurance Association, Lim.*, 85 L. J. (K. B.), 1185, the clause which gave jurisdiction to the arbitrators is a most general one.* This clause was sustained. In *Stebbing* v. *Liverpool & London & Globe Insurance Co., Lim.*, 33 T. L. Rep., 395, 117 L. T. Rep. 247 (K. B. D.), May, 1917, before Earl Reading, *C. J.*, the policy provided that "all differences under this policy" shall be referred to arbitration. Under this clause it was held that the arbitrators could consider whether or not the statements made by the assured, upon the basis of which the policy was issued, were true; that though the untruth of the representations might avoid the policy, nevertheless "This is a matter of difference arising out of

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*"If a difference at any time arises between the Association and the Assured as to any amount payable, or as to any matter touching the rights, duties, and liabilities of the Assured or Association, or otherwise, in any way relating to, or arising out of the policy, every such difference when and as the same arises shall be referred to arbitration of some one person to be agreed upon by both parties or, failing such agreement, to two indifferent persons, one to be chosen by the party claiming and the other by the Association, and in case of disagreement between the Arbitrators such difference shall be decided by an umpire whose decision shall be conclusive and binding on both parties. The Arbitrator Arbitrators or Umpire, shall at the request of either party state the facts upon any question of law in the form of a Special Case for the opinion of the Court: Each party shall pay his or their own costs of the reference, and a moiety of the costs of the award (including the Arbitrators' and Umpire's fees). The Arbitrator or Arbitrators or Umpire shall fix a sum on account of his or their fees, and the costs of the award to be lodged with him or them, one half of such sum to be paid by each party before entering upon the reference. In all other respects the reference and award shall be subject to the provisions of the Arbitration Act, 1889."

the policy." *Gray* v. *Baron Ashburton,* 115 L. T. Rep., 729 [1917], A. C. 26, in which the House of Lords, Earl Loreburn, Viscount Haldane and Lords Atkinson and Shaw sitting, reversed the Court of Appeal. Rule 14 of Schedule 2 of the Aricultural Holdings Act 1908 provided that the costs of and incidental to the arbitration and award should be in the discretion of the arbitrator, and by Rule 15 the arbitrators should in awarding costs take into consideration the reasonableness or unreasonableness of the claim of either party, either in respect of amount or otherwise. "The effect of those rules is to give the arbitrator appointed under that Act wider powers as to dealing with costs than those which a judge of the High Court has. Therefore where an arbitrator was acting within the discretion conferred upon him by the Acts, and there was no ground for suggesting either misconduct or want of jurisdiction, and he ordered that the successful party should pay the costs of the award, the court had no jurisdiction to interfere with his discretion." In the recent case of *Clements* v. *County of Devon Insurance Committee* (1918), 1 K. B. 94, decided in the Court of Appeal, the form of the agreement of arbitration was as follows:

> "any dispute or question arising between the committee and the practitioner * * * relating to the construction of this agreement or the rights and liabilities of the committee or the practitioner * * * hereunder shall be referred to the Commissioners." "Where under the provisions of these regulations or of any agreement made between the committee and a practitioner on the panel * * * any question arising between the committee and the practitioner * * * is referred, or any appeal from a decision of the committee is

made, to the Commissioners, the Commissioners shall determine such question or appeal in such manner as they think fit, and if in the opinion of the Commissioners a hearing is required they may authorise any two or more of the Commissioners to hear and determine such question or appeal, and any decision of the Commissioners or any of them made under this article shall be final and conclusive."

It was held that this was a valid submission to arbitration and that the commissioners were to be regarded "as the tribunal under a special form of arbitration to whom the parties have agreed to refer their differences" (p. 100). From *Lobitas Oil Fields, Lim.*, v. *Admiralty Commissioners*, 86 L. J. (K. B.), 1444, 117 L. T. Rep. 28, we learn that during the war there was created an "Admiralty Transportation Board," with power to arbitrate differences. *Brodic* v. *Cardiff Corporation* (1919), A. C., 337, was decided by the House of Lords in December, 1918. Here the contract in question provided "that in case any dispute should arise, either during the progress of the works or after the determination of the contract, as to the construction of the contract, or as to any matter or thing arising thereunder, or as to any objection by the contractor to any certificate, finding, decision, requisition, or opinion of the engineer, such dispute was to be referred to the arbitration and final decision of a single arbitrator, and either party might demand an immediate determination of the dispute." It was held by Lord Finlay, *L. C.*, Lord Atkinson, Lord Shaw of Dunfermline and Lord Wrenbury, Lord Sumner dissenting, that under this clause the arbitrators "had power to

award that the items in question should be paid for as extras, notwithstanding the absence of any orders in writing by the engineer." In this case Lord Wrenbury said:

> "The arbitration clause extends to any dispute between the corporation or the engineer on their behalf, and the contractor. The question whether the engineer ought to have given a written order is within those words. It extends to 'any matter or thing arising' under the contract. The right to payment under the contract is a matter arising under it. Of course so far as that right depends upon the true construction of the contract that is matter of law. But assuming that as matter of law upon the construction of the contract it is possible that payment is due, it is for the arbitrator to say whether upon the facts it is due or not. In other words, if the arbitrator can—as he can—review the action of the engineer in refusing an order in writing it must be that in reviewing he is by the contract empowered so to do, not idly and without result, but that he can as arbitrator give effect to that review by finding that the money is due, because the engineer was, as he finds, wrong in refusing the order which he was contractually bound to give" (pp. 365-366).

Re Arbitration between Wulff and Dreyfus & Co., 117 L. T. Rep., 583. D. & Co. sold grain to W., the contract containing clauses providing for arbitration.* Other clauses indorsed on the con-

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* All disputes arising from time to time out of this contract, including any question of loss appearing in the proceedings, whether arising between the parties hereto, or between one of the parties hereto, and the trustee in bankruptcy of the other party, shall be referred to arbitration according to the arbitration rule endorsed thereon: Neither buyer, seller, trustee in

tract provided that claims for arbitration should be made within a certain period, and that from the arbitrators' award there should be "a right of appeal in event of anybody being dissatisfied with the award" to the committee of appeal of the London Corn Trade Association. The dispute was as to whether the demand for arbitration had been made by W. within the time limited, and both the arbitrators and the committee on appeal held that it had not. W. then asked the committee to state their award in the form of a case for the opinion of the court (pursuant to Sec. 7 of the Arbitration Act, 1889), but "'on the suggestion of the sellers (D. & Co.), the buyer agreed that the question should be submitted to counsel in the same way as it would be submitted to a court under a special case.'" Counsel supported the arbitrators and committee, and then W. attempted to appeal to the courts. It was held by the Court of Appeal, sustaining the Divisional Court (K. B. Div.), that, if this had been a case where opinion and advice of counsel was asked upon a legal point, then an appeal would have lain to the courts upon the award stated as a case; but that since it was in fact the evident intention of the parties to submit the award stated in the form of a special case "to him (counsel) *as being substituted for the court—as a substituted court,* if I may use that expression—then it is plain that not only could the appel-

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bankruptcy, nor any other person claiming under either of them, shall bring any action against the other of them in respect of any such dispute until such dispute has been settled by arbitrators, or by the committee of appeal, as the case may be, and it is expressly agreed that the obtaining an award from either tribunal, as the case may be, shall be a condition precedent to the right of either contracting party to sue the other in respect of any claim arising under this contract."

lant not challenge the award on the ground of error of law apparent on the face of it, but that *no appeal would be open to him;* because although the law allows an appeal to the court if a special case is stated for the opinion of the court, there is no appeal *if the parties choose to substitute counsel for the court."* (Opinion of Bankes, *L. J.,* p. 589. Italics ours.)

In *Woodall* v. *Pearl Assurance Company, Limited* (1919), 1 K. B. 593, decided by the Court of Appeal in February, 1919, the Court distinguishes the case of *Jureidini* v. *National British and Irish Millers Insurance Co.* (1915), A. C. 499, wherein the Court held that fraud vitiated the entire contract, including the clause for arbitration; and here, following the *Stebbing* case, held that where the company is repudiating liability under the contract upon the ground that the assured had misstated his occupation in the proposal, or, if not, had changed his occupation for one involving increased risk, of which notice as required had not been given and in consequence contended that the policy was void, this was a matter referable under the general arbitration clause.*

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*"Condition 11: 'If any question shall arise touching this policy or the liability of the company thereunder or the extent or nature of such liability or otherwise howsoever in connection herewith then the assured and all persons claiming through the assured may refer and shall be bound if the company shall so require to refer the same to arbitration by one arbitrator to be agreed on or in default of agreement by two arbitrators and their umpire under the Arbitration Act, 1889, who alone shall deal with all questions including costs, or if the claimant resides in Scotland then under the Arbitration (Scotland) Act, 1894, and no person shall be entitled to bring or to maintain any action or proceeding on this policy except for the sum awarded under such arbitration.'"

There will be found in Chapter XVII, p. 227, an arrangement by chronology of the English cases prior to 1916, showing the influence of Lord Coke's dictum for revocability, Lord Kenyon's, Lord Eldon's, Lord Cranworth's and Lord Campbell's influence in favor of sustaining arbitration agreements, and the final series of cases down to 1914 which brought the English common law on this subject in harmony with the general doctrines of the common law, namely, that parties were to be encouraged to dispose of their controversies out of court and a contract based upon mutual concessions was not to be avoided in the particular in which parties agreed to arbitrate a controversy arising thereunder.

We have endeavored in Chapter XVII to trace the source of error of our American law and in Chapter XVIII the development of our law in the Federal Courts. We believe that *Insurance Co.* v. *Morse,* 20 Wall. 445, 22 L. Ed. 365; *Doyle* v. *Continental Insurance Co.,* 94 U. S. 535, 24 L. Ed. 148, and *Perkins* v. *United States, etc., Co.* (C. C.), 16 Fed. 513, rest upon an inadequate analysis of the English authorities, and that the decision by the Federal Circuit Court of Appeals in the Sixth Circuit, in *Toledo S. S. Co.* v. *Zenith Transp. Co.,* 184 Fed. Rep. 391, in 1911, Warrington, Denison and Hollister, JJ., is really the sound Federal law upon the subject —or should be so regarded. The case in the United States Supreme Court which is the basis for the prevailing Federal rule is *Insurance Co.* v. *Morse,* 20 Wall. 445, which rests upon the following proposition of Mr. Justice Hunt:

> "There is no doubt of the general principle that parties cannot by contract oust the ordinary courts of their jurisdiction" (p. 451).

This quotation is taken from *Scott* v. *Avery* and includes the reference from *Thompson* v. *Charnock* (Lord Kenyon) "that the fact that the parties had agreed that the matter should be settled by arbitration did not oust the jurisdiction of the courts." We confidently believe that this is an erroneous interpretation of *Scott* v. *Avery* and that treating *Thompson* v. *Charnock* as authoritative was error on the part of our courts; indeed, this is the same error as the error made by the Court of Appeals of the State of New York (see Chapter XVII, p. 228 *et seq.*). *Insurance Co.* v. *Morse* was decided in 1874. At that time the English authorities were still in a state of confusion, and so far as we have been able to discover no attempt has since been made to present to this court the change in the English law arising out of the later and better application of the principles of the common law to the subject, nor has there, so far as we know, been presented before to this court a comprehensive review of the development of the law upon this subject. It is quite true that Judge Story is frequently quoted for the doctrine of "ouster" (pp. 250, 251); but Judge Story's opinion rests upon Vynior's case and the since reversed English precedents resting thereon (see Chapter XVIII, p. 250).

IV.

The provision in the ordinary contract of merchants that, in the event of dispute or controversy, there shall be submission to arbitration, is not intended to "oust the courts of jurisdiction," but is merely expressive of the intent of the parties to keep out of court if they can and to endeavor to compose their differences either through conciliation or arbitration.

In *Scott* v. *Avery* Lord Chancellor Cranworth held that the intention of the parties was "that the sum to be recovered should be only such a sum as, if not agreed upon in the first instance between the committee and the suffering member, should be decided by arbitration, and that the sum so ascertained by arbitration, and no other, should be the sum to be recovered." "And," said the learned chancellor, "if that was their meaning, the circumstance that they have not stated that meaning in the clearest terms, or in the most artistic form, is a matter utterly unimportant." (5 H. L. C. 811, at p. 849.) And in *Waters* v. *Taylor* Lord Eldon said:

> "* * * the forum they have provided for themselves * * * [it] shows their intention against the interference of any other jurisdiction, until they have tried the effect of the special means, provided by themselves" (15 Vesey Jr. 10, at p. 17).

The failure to interpret such clauses according to their common meaning and the insistence upon

some positive formula justifying the finding of a *condition precedent* has been due, we believe, to three things: (a) Failure to apply the customs and understandings of merchants; (b) failure to apply the doctrine of *Scott* v. *Avery* and *Halfhide* v. *Fenning;* (c) failure to appreciate that the dictum in Vynior's case has lost its authority (see Chapter XX, p. 266 *et seq*). Lord Ashbourne says in *Hamlyn & Co.* v. *Talisker Distillery,* 6 The Reports 188, page 201:

> "A contract which provided that disputes should 'be settled by arbitration by two members of the London Corn Exchange or their umpire in the usual way,' distinctly introduces a reference to well-known laws regulating such arbitrations, and those must be the laws of England. This interpretation gives due and full effect to every portion of the contract, whereas the arbitration clause becomes mere waste paper if it is held that the parties were contracting on the basis of the application of the law of Scotland, which would at once refuse to acknowledge the full efficacy of a clause so framed."

In the same case Lord Kinnear said:

> "The contract which they made in these circumstances is that disputes should 'be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way.' Now, when a London merchant stipulates that disputes under his contract are to be referred to members of such a body as the London Corn Exchange—that is, to merchants or brokers carrying on business in the city of London—I think that that means that the tribunal is to be constituted and the arbitration conducted in London; and when it is further stipulated

> that the arbitration is to be by two members of the Corn Exchange, 'or their umpire, in the usual way,' *I think that that imports a reference to a known law and practice regulating the constitution and conduct of such arbitrations, and that can only be the law and practice of England.*" (21 Session Cases [4th Series] 204, at p. 212—italics ours.)

In *Daley* v. *People's Building, etc., Assoc.*, 178 Mass. 13, Judge Holmes (now Mr. Justice Holmes) held that an agreement by stockholders that, "Any action brought against this association by any shareholder shall be brought * * * in the County of Ontario, State of New York" was valid and a bar to a suit in Massachusetts. In this decision there is indicated no fear of "ouster" of the Massachusetts courts of any jurisdiction. Judge Holmes said:

> "It is true that in this case the question is not between counties, but between States, and that our decision requires a resident of Massachusetts to go elsewhere for a remedy upon a contract made here."

Nevertheless, he held that the clause should be sustained.

Parties are encouraged every day to oust the courts of jurisdiction of a controversy by settling their dispute "out of court." We are establishing throughout the country courts of conciliation to accomplish this result. The pacific adjustment of disputes is one of the rational aims of mankind. In 1693 Lord Stair, the great Scotch writer, wrote (at a period when commerce had made little progress in his own country) that Scotch law and custom

> "regard not inconsiderable damage in traffic, that it (a business contract) may be current and secure, for nothing is more prejudicial to trade than to be easily involved in pleas, which diverts merchants from their trade, and frequently mars their gain and sometimes their credit" (see *Mackenzie* v. *Girvan*, 3 Session Cases, 2nd Series, 318, at p. 323).

Judge Allen said in the *Pres't, etc., D. & H. Canal Co.* v. *Pa. Coal Co.*, 50 N. Y. 250, at p. 258:

> "But when the parties stand upon an equal footing and intelligently and deliberately, in making their executory contracts, provide for an amicable adjustment of any difference that may arise, either by arbitration or otherwise, it is not *easy to assign at this day* any good reason why the contract should not stand, and the parties made to abide by it, and the judgment of the tribunal of their choice. Were the question *res nova,* I apprehend that a party would not now be permitted, in the absence of fraud or some peculiar circumstances entitling him to relief, *to repudiate his agreement to submit to arbitration, and seek a remedy at law, when his adversary had not refused to arbitrate, or in any way obstructed or hindered the arbitration agreed upon*" (italics ours).

The right of trial by jury is one that can be waived. The right to bring suit at all can be waived. The parties may waive it by agreement to forbear from bringing suit, or, after suit, by stipulating in open court to discontinue. They may even consent to the entry of judgment. By so doing, of course, they set aside and supersede the operation of the law

and such protection as it was designed and framed to afford. Yet this is not against public policy. (See *McAllister* v. *Smith*, 17 Ill. 328, 334; *Dike* v. *Erie Railway Co.*, 45 N. Y. 113, 116; *Grand* v. *Livingston*, 4 App. Div. 589, 593; *Union National Bank* v. *Chapman*, 169 N. Y. 538, 545; *Lee Breton* v. *Miles*, 8 Paige 261.) In the case of *The Oranmore*, 24 Fed. Rep. 922, the parties stipulated that

> "any questions arising under this contract or the bill of lading against the steamer or her owners shall be determined by English law in England."

The Court held that this was valid and that

> "the court should give effect to this clause of the agreement. It leaves the intention of the parties beyond doubt of any kind, and that intention was to give to the provisions of the bill of lading such efficacy as the English courts would give to them."

It is not any part of the duty of the court to prevent parties from settling their controversies in any manner they choose. As matter of fact, the courts are assiduous to enforce releases unless they have been procured through fraud, duress or mistake. In disposing of accounts stated, the courts are exceedingly reluctant to disturb adjustments that have been made. Yet by virtue of such settlements or exchange of releases grave questions of law frequently are kept from determination by the court, ofttimes questions the determination of which might contribute much to the comprehensive and complete development of the law. From the point of view of society, it might be urged sometimes that a determination of the particular ques-

tions of constitutionality or other law involved is of more importance than the disposition of the controversy immediately in hand, yet this consideration has never prevailed with the courts, nor resulted in the rejection of an adjustment or a settlement of the controversy, with the consequent waiver and elimination of an existing and perhaps important question of law. It has long been settled that the prevention of litigation is a valid and sufficient consideration for the settlement of a controversy:

> "For the law favors the settlement of disputes." (Parsons, "Law of Contracts," Vol. I, p. *438. See *Penn* v. *Lord Baltimore,* 1 Ves. Sen. 444; *Wiseman* v. *Roper,* 1 Chanc. 158; *Barlow* v. *Ocean Ins. Co.,* 4 Met. 270; *Stapilton* v. *Stapilton,* 1 Atk. 3; *Zane* v. *Zane,* 6 Munf. 406; *Taylor* v. *Patrick,* 1 Bibb 168; *Fisher* v. *May,* 2 Bibb 448; *Brown* v. *Sloan,* 6 Watts 321; *Stoddard* v. *Mix,* 14 Conn. 12; *Rice* v. *Bixler,* 1 W. & S. 456.)
>
> "No investigation into the character or value of the different claims submitted will be entered into for the purpose of setting aside a compromise, it being sufficient if the parties entering into the compromise thought at the time that there was a question between them." (Parsons, "Law of Contracts," p. *439. *Ex parte Lucy,* 21 E. L. & E. 199; *Mills* v. *Lee,* 6 Monr. 91; *Moore* v. *Fitzwater,* 2 Rand. [Va.] 442; *Bennet* v. *Paine,* 5 Watts 259; *Pierson* v. *McCahill,* 21 Cal. 122; *Clark* v. *Gamwell,* 125 Mass. 428; *Flannagan* v. *Kilcome,* 58 N. H. 443.)

No wonder we find in the footnote to *Corpus Juris* (Vol. 5, p. 53, note 12a) the rule of revocation called

> "a highly technical rule, and the enforcement of it against the purposes of parties who have sought a settlement of their disputes out of court by a tribunal of their own choosing has at times provoked protest from common-law judges."

And referring to the frequent provisions for arbitration in contracts relating to great public improvements (see Appendix D to the book), Judge Grier said, in *Fox* v. *The Railroad,* 3 Wall. Jr. 243, at page 247:

> "Such a clause in contracts like those constantly made by corporations for great public improvements, is absolutely necessary to prevent the corporations from being ruined by endless litigation. It should be liberally construed and not subjected to ingenious criticism in order to support the jurisdiction of courts of law and encourage litigation."

Judge Maule said:

> "The old rule upon which it was held that the power of an arbitrator was revocable, was, that a power not coupled with an interest, was revocable,—revocable by the authority which created it. From that rule it was inferred,—erroneously, as I think,—that one of the parties to a submission might revoke without the other. It seems to me that that was allowing one man to affect the interest of another. *But it was an inveterate error."* (*Northampton Gas-Light Co.* v. *Parnell,* 15 C. B. 630, 645, 80 E. C. L. 630, 139 English Reprint 572. Italics ours.)

Judge Parker, in the case of *La Greve* v. *Aetna Live Stock Insurance Co.,* 81 Hun 28, at page 30, said:

> "The suggestion that the Court should resent this attempt to oust it of jurisdiction is unworthy of extended notice";

and the great English judge, Jessel, Master of the Rolls, said:

> "* * * if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice." (*Printing and Numerical Registering Co.* v. *Sampson,* L. R. 19 Eq. 462, at p. 465.)

So, also, the late Judge Earl of the New York Court of Appeals said:

> "Parties by their stipulations may in many ways make the law for any legal proceeding to which they are parties, which not only binds them, but which the courts are bound to enforce." (*Matter of N. Y. L. & W. R. R. Co.,* 98 N. Y. 447, at p. 453.)

This superb policy of the law is illustrated in many ways. The parties to a contract may require the commencement of an action within a period shorter than that required by Statutes of Limitations and thus make their own Statute of Limitation. They may limit their liability for negligence and may, indeed, provide an exclusive form of remedy which the courts will enforce. In an introduction to Bulletin XII, the American Judicature Society says:

> "The present universal fear of litigation, with its slow and costly procedure and interminable appeals, is a principal reason for this irregular method of reaching a settle-

> ment—for it ought not to be dignified by the name of arbitration. Its fault is not merely that of inexpertness, but that it is dominated by compulsion, not by mutuality. Arbitration is the means by which this growing function is to be methodized and regulated in a public manner. It should be viewed, not as hostile to courts, but as a special method of adjudication adapted to certain modern needs, a new arm of the law supplementing courts in a practical way."

As Mr. Harley says:

> "Arbitration is * * * a constructive social function weaving into the fabric of commercial life to strengthen rather than sever its threads."

V.

Conclusion.

It is the earnest hope of the Chamber of Commerce that the court will hear its plea, quite independent of the interests of the parties to the special controversy, and that it will take occasion to re-examine into the basis in reason and in authority for this judicially and commercially unpopular doctrine of the law. If we are correct in our belief that it is *not* a doctrine of the law, then surely the dead hand of unsound precedent should no longer paralyze the arteries of trade.

All of which is respectfully submitted.

CHAMBER OF COMMERCE OF THE
STATE OF NEW YORK,
By JULIUS HENRY COHEN,
Its Counsel.

Dated, February 20, 1920.

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 171.

REDERIAKTIEBOLAGET ATLANTEN,
Petitioner (Respondent below),

against

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET,
Libelant.

BRIEF FOR PETITIONER.

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SUBJECT INDEX.

INDEX OF CASES AND TEXT BOOKS CITED.

Supreme Court of the United States

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vs.

AKTIESELSKABET KORN-OG FODER-STOF KOMPAGNIET,
Libelant.

BRIEF FOR REDERIAKTIEBOLAGET ATLANTEN, PETITIONER (RESPONDENT BELOW).

Statement.

This is a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Second Circuit which affirmed a final decree of the United States District Court for the Southern District of New York for $39,016.30 in favor of the libelant, charterer of the steamship *Atlanten,* for damages for the breach of the charter-party to the extent of the difference between the charter-

party rate and the market rate at the time that the vessel failed to perform her charter.

The opinion of the District Court is printed in the Transcript of Record, p. 17; the two opinions of the Circuit Court of Appeals, pp. 25 and 29, and the final decree, p. 21.

The answer of the steamship owner admitted the making of the charter and that the *Atlanten* had failed to make the voyage. It set up two defenses, (1) in articles 9 to 15 of the answer (pp. 15, 16) that the libelant was a Danish corporation, the respondent a Swedish corporation; that the charter-party was signed in Denmark; that the charter-party provided for arbitration, and that both by the laws of Sweden and Denmark the arbitration clause was binding and was a condition precedent to the right of either party to sue the other; (2) in article 8 (p. 14) a partial defense that the charter-party limited the recovery for failing to make the voyage to the proved damages, with the limitation that they were not to exceed the estimated amount of charter freight. The libelant excepted to the answer and thus distinctly raised the question of the validity of these defenses. Judgment was given in favor of the libelant for the entire damages claimed, as above stated.

FIRST POINT.

The Court should have refused jurisdiction on the ground that the case should have been arbitrated before resort was had to the decision of the Court.

1. THE FACTS.

The 21st clause of the charter-party reads as follows:

"21. If any dispute arises the same to be settled by two referees, one appointed by the Captain and one by charterers or their agents, and if necessary, the arbitrators to appoint an Umpire. * * *"

The above clause then states that the award of the arbitrator shall not be revoked without leave of Court.

The Defense—How Pleaded. The eleventh article of the answer alleges:

"At the time of the making, execution and delivery of the said charter-party it was, and at all times since then has been, the law of the Kingdom of Denmark, applicable to said charter-party, that a provision in a charter-party that any dispute arising thereunder should be settled by arbitration, each party nominating their arbitrator and the latter agreeing upon an umpire, if necessary, is a valid and binding agreement for arbitration, and is binding upon each party to the said charter-party, and arbitration accordingly of any dispute arising thereunder is a condition precedent to the right of either party to sue the other in any court for, upon or by reason of any matter or dispute with respect to or arising under said charter."

The twelfth article of the answer alleged that the law of Sweden was the same as the law of Denmark, and the thirteenth article alleged that the respondent had been ready and willing at all times to arbitrate, but that the libelant had failed and neglected to do so. The fourteenth clause of the answer states that under the law of Denmark and Sweden libelant had no right to bring any libel in any court for, upon or by reason of any matter or dispute set forth or referred to in the libel herein, but was pledged to submit the same to arbitration, in accordance with the terms of the charter-party, and the fifteenth article of the libel demanded that since the dispute was a dispute between foreigners in connection with a contract made in Denmark, the Court should not entertain jurisdiction.

2. ARBITRATION AGREEMENTS SHOULD BE VALID.

Decisions refusing to enforce arbitration agreements unsound. There is no reason why agreements to arbitrate, solemnly entered into by parties of lawful age, should not be enforced, except the historical reason from which Lord Campbell said the rule arose, quoted by Judge Hough in *U. S. Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.,* 222 Fed., 1006, at 1007:

"in the contests of the courts of ancient times for extension of jurisdiction—all of them being opposed to anything that would altogether deprive every one of them of jurisdiction."

Judge Hough appropriately says, "A more unworthy genesis cannot be imagined" (222 Fed., 1007).

Arbitration increasing. At the present time the tendency toward arbitration is becoming more and more marked. It is being introduced to settle international questions and labor disputes, as well as commercial disputes. The principle has been recognized by the Appellate Division of the Supreme Court of New York in both the First and Second Departments, which have recently approved the rules for arbitration made by the Municipal Court. Many of our states have statutes allowing arbitration. Our stock, produce and other exchanges have permanent arbitration boards.

Book of the New York Chamber of Commerce. The Chamber of Commerce is interested in forwarding the movement, and the counsel of its Committee on Arbitration, which has charge of this matter, in 1918 published a treatise reviewing the whole subject: *"Commercial Arbitration and the Law,"* by Julius Henry Cohen.

In an address before the Chamber of Commerce of the State of New York on June 1, 1911, Judge Vernon M. Davis, of the Supreme Court of the State of New York, said:

"I also congratulate this Chamber of Commerce upon bringing again into existence a simple and effective plan for settling business disagreements without resort to the courts. In this, as in many other things, the Chamber has maintained its character of being alive to all public needs, and has performed an important public service. Why should business men undertake long and expensive litigation over ordinary differences arising between them? I think it must be a habit, and a bad habit too. I am hopeful to predict, and I appeal to your experience to justify that prediction, that a very large number of the disputes that are now carried

to the courts will be settled speedily and inexpensively under the scheme of arbitration which has just been adopted by this Chamber. * * *

The plan adopted by the Chamber is in no sense in competition with the courts, nor can it be justly regarded as a protest against any real or fancied delay in the administration of justice in this city. It has arisen out of an obvious condition of business life here, the obvious fact that it is practicable to avoid the delay and expense of a suit in court by a resort to arbitration, and the courts look upon these settlements with great favor, and it is the policy of the law to encourage arbitration, so much so that by special statute the awards of arbitration may become the judgment of the Supreme Court, judgments of as high a sanction as those obtained in the formal litigation in the courts" (*Cohen on Commercial Arbitration,* 260).

If it were necessary to reverse decisions refusing to enforce arbitration, they should be reversed. Cases of the absolute unqualified reversal of previous decisions are frequent. For example, the legal tender cases:

> *Knox* v. *Lee,* 12 Wall., 457, reversing
> *Hepburn* v. *Griswold,* 8 Wall., 603.

The income tax cases:

> *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S., 429, reversing
> *Springer* v. *The United States,* 102 U. S., 586, and
> *Pacific Insurance Co.* v. *Soule,* 7 Wall., 433.

In *The Genesee Chief* v. *Fitzhugh,* 12 Howard, 443, the United States Supreme Court held that the admiralty jurisdiction of the United States Courts extended to navigable lakes and rivers connecting

them, and was not limited to tide waters, reversing completely the Court's decision in *The Steamboat Thomas Jefferson,* 10 Wheaton, 428 (1825).

Chief Justice Taney in the course of his opinion writes:

"It is the decision in the case of the *Thomas Jefferson* which mainly embarrasses the court in the present inquiry. We are sensible of the great weight to which it is entitled. But at the same time we are convinced that, if we follow it, we *follow an erroneous decision* into which the court fell, when the great importance of the question as it now presents itself could not be foreseen; and the subject did not therefore receive that consideration which at this time would have been given to it by the eminent men who presided here when that case was decided. For the decision was made in 1825 when the commerce on the rivers of the west and on the lakes was in its infancy, and of little importance, and but little regarded compared with that of the present day."

Mr. Justice Lurton has said:

"The Circuit Court of Appeals was obviously not bound to follow its own prior decision. The rule of *stare decisis,* though one tending to consistency and uniformity of decision, is *not inflexible.* Whether it shall be followed or departed from is a question entirely within the *discretion* of the Court which is again called upon to consider a question once decided." (Italics ours.)

Hertz v. *Woodman,* 218 U. S., 205, p. 212.

Our learned jurists have reached the same conclusion. Chancellor Kent says in his Commentaries, 14th Ed., Vol. 1, p. 477:

"But I wish not to be understood to press too strongly the doctrine of *stare decisis,* when I recol-

lect that there are more than one thousand cases to be pointed out in the English and American books of reports, which have been overruled, doubted, or limited in their application. * * * Lord Mansfield frequently observed that the certainty of a rule was often of much more importance in mercantile cases than the reason of it, and that a settled rule ought to be observed for the sake of property; and yet, perhaps, no English judge ever made greater innovations and improvements in the law, or felt himself less embarrassed with the disposition of the elder cases when they came in his way, to impede the operation of his enlightened and cultivated judgment. The law of England, he observed, would be an absurd science, were it founded upon precedents only."

Mr. Justice Holmes has said:

"The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis. And as the law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism, it will be found that, when ancient rules maintain themselves in the way that has been and will be shown in this book, new reasons more fitted to the time have been found for them, and that they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted."

Oliver Wendell Holmes, Jr., The Common Law, p. 35.

And also:

"The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."

The Common Law, p. 41.

Reason for the rule having ceased, the rule should cease. The first reason given for the origin of the rule by Judge Hough that the Courts wanted to try as many cases as possible, when paid by a fee system, no longer prevails, the modern effort being to give the Courts more time to consider their cases by relieving their overcrowded calendars. The rule of public policy certainly does not hold to-day, and this is clearly a case for the application of the well-established legal maxim: *"Cessante ratione legis cessat, et ipsa lex."*

Coke Litt., 70-b.
2 *Blackstone Comm.*, 390-391.

3. THE COURT SHOULD ENFORCE FOREIGN LAW AS TO THESE FOREIGNERS.

Not necessary to overrule arbitration decisions. There is no occasion, however, to overrule arbitration decisions in this case. This is not a question whether a United States Court will enforce an arbitration agreement in which a citizen of the United States is one of the parties, on the ground that such contracts are not binding under our law, but it is a case where the question before the Court is whether, when a contract is made in Denmark, between Danish and Swedish corporations, the arbi-

tration agreement being absolutely valid by the law of the country where the contract is made and the parties reside, this Court will consider it in the interest of justice to let one of these parties come over to the United States and sue in our Courts for the purpose of avoiding his just legal obligations.

The case governed by the law of Denmark. Foreign law may be pleaded and proved. It has been pleaded, and it is admitted in this case that under that law the arbitration is binding. There can be no question that this Court should enforce that law. There can also be no question that this Court has the power to refuse jurisdiction. In *Goldman* v. *Furness, Withy & Co.,* 101 Fed., 467, Judge Brown of the Southern District of New York refused to take jurisdiction in a suit between foreigners on the ground that the ends of justice would not be promoted thereby. Mr. Justice Holmes said, in the case of *Cuba R. R. Co.* v. *Crosby,* 222 U. S., 473, at p. 479:

"The extension of the hospitality of our courts to foreign suitors must not be made a cover for injustice to the defendants of whom they happen to be able to lay hold."

4. The Leading Authorities.

Two important cases in the Southern District of New York. Two cases were conspicuously referred to in the court below, though they were not as strong as the case at bar, since in each case the libelant was a citizen of the United States, while in the case at bar both parties were foreigners.

United States Asphalt Refining Co. v. *Trinidad Lake Petroleum Co.*, decided by Judge Hough, 222 Fed., 1006, already referred to.

Frank C. Clark v. *Hamburg-American Packet Co.* (unreported). This case, decided by Judge Ward, is printed as an appendix to this brief (p. 37). See also Fix v R. R 3 Wall 273 245

These cases have now been superseded by the decision of the Circuit Court of Appeals in the case at bar, but are cited because they are believed to be the two cases most in point on the question whether a foreigner can avoid his valid contract to arbitrate by suing in our courts.

The opinion of Judge Hough in the *Asphalt Company* case gives a valuable review of the authorities. He thus states the point in issue:

"Libelant asserts that, whether the contract was or was not good at the time and place of making, it has always been invalid under the law of the United States and most of the states thereof, with the admitted and asserted result that an American may make a solemn contract of this nature in England and repudiate it at will in America with the approbation of the courts of his own country."

Judge Hough cites the various reasons given for refusing to enforce arbitration agreements, and indicates that he does not find them satisfactory. He concludes that, on the facts in the *Asphalt Company* case, he is bound by authority.

"I think the decisions cited show beyond question that the Supreme Court has laid down the rule that such a complete ouster of jurisdiction as is shown by the clause quoted from the charter parties is void in a federal forum. It was within the

power of that tribunal to make this rule. Inferior courts may fail to find convincing reasons for it; but the rule must be obeyed, and these motions be severally denied" (222 Fed., p. 1012).

In the Circuit Court of Appeals, in the case at bar, Judge Hough said of the general rule that arbitration agreements will not be enforced (Record, p. 29):

"Whether the rule as given can long survive historical and logical criticism I venture to doubt."

Frank C. Clark v. *Hamburg-American Packet Co.* (printed in the appendix) is a decision squarely in favor of petitioner, recognizing an arbitration agreement made between foreigners.

The Law of Massachusetts. In a similar case, the Supreme Court of Massachusetts has held that, where foreigners provide in their contract that questions under the contract shall be decided by their own courts, the provision will be held binding by an American court.

> *Mittenthal* v. *Mascagni,* 183 Mass., 19.
> *Daley* v. *People's Building etc. Assn.,* 178 Mass., 13.

In 1902 the plaintiff Mittenthal made an agreement with the composer Mascagni for the latter to make a fifteen weeks' concert tour in the United States and Canada. This agreement was made in Florence, Italy, "where the defendant, a subject of the King of Italy, had his home, and where the plaintiffs, citizens of the City of New York, elected a domicile by a provision of the contract" (183 Mass., at 21). There was a provision in the contract as follows:

"The present contract in its form and substance is regulated by the Italian laws, by the will of the parties concerned, and according to Article 9 of the Italian Civil Code. Whatever difference or question there might arise between the parties, including the agent, will be acted upon by the civil authorities of Florence, Italy. Maestro Mascagni reserves the right of direct action in New York for payment of his recompense, and therefore he, alone, has the faculty to derogate the conditions of the established contract."

Mittenthal attempted to sue Mascagni in the Massachusetts Court for an alleged breach of the agreement, and it was held by the Massachusetts Supreme Court, Knowlton, C. J., writing the opinion, that the action could not be maintained. He said:

"We have little doubt that it was meant to give exclusive jurisdiction of all such matters to the Italian Courts, saving only jurisdiction of suits by the defendant to recover his compensation, which is given to the Courts of New York. This seems to be the meaning of the words of this translation * * * *It is averred in the answer in abatement that such a provision is legal and binding under the laws of Italy;* of course, if this be true, *it is immaterial what construction is put upon it under our laws"* (p. 22).

"We can fancy the parties to this contract at the time of making it saying something like this: 'As the performance of this contract will not only involve travel through one or more foreign countries in going to America and returning, but will involve journeying long distances through a great many independent States, each of which has its own courts and system of laws, under some of which a person sued in a civil action, when about to leave the State, may be arrested and held to bail or to imprisonment, if suits may be brought in any one of these numerous jurisdictions, there

is a liability to great trouble and expense on the part of the defendant in meeting the litigation. * * * It will be better and more reasonable for both of us to provide that our controversies, if any arise, shall be settled by the courts of Florence, than to leave both parties subject to suits in forty or fifty different jurisdictions, at great distances from the home of either.' If, moved by such considerations, the parties made the agreement in question, shall the court say that they were *non compotes mentis*, and that their agreement was so improvident and unreasonable that it cannot be permitted to stand?" (pp. 23-24).

Mr. Justice Holmes reached the same conclusion in the *Daley* case.

5. GROUNDS ON WHICH THE COURT BELOW REFUSED TO RECOGNIZE THE ARBITRATION CLAUSE.

Judge Hough's opinion in the case at bar. As stated above, Judge Hough doubted if the rule refusing the enforcement of arbitration agreements could long survive, and placed his decision on the following ground (p. 29):

"Concurrence as to clause 21, I rest on the plain fact that respondents repudiated their agreement *in toto*, and thereby debarred themselves from insisting upon any single subordinate part thereof (*Jureidini* v. *National etc. Co.* [1915], A. C., 499)."

The *Jureidini* case was an action on an insurance policy which provided that if the *amount* of the loss was disputed, the *amount due* should be fixed by arbitrators, and the fixing of this amount should be a condition precedent to bringing suit. The insurance company refused to pay the loss on the ground that the insured had been guilty of arson.

When the insurance company was sued it pleaded arson as a defense and also that no arbitration had been had.

Held, that the real issue in the case was arson, which went to the general merits of the case, not to damages, and that since the liability under the contract, not the amount of damages, was the question to be solved, arbitration had nothing to do with its determination. The arbitrators were not to settle every matter in dispute but, like commissioners in an admiralty court, were to deal with damages only.

In the course of the *Jureidini* opinion it was stated that *respondents* had repudiated their agreement *in toto* and therefore could not rely on the arbitration clause, appropriate language in connection with the facts, but, we submit, not applicable to the case at bar.

The petitioner does not repudiate the agreement but has always admitted every word of it, and relies upon clauses in it. The petitioner has always admitted its obligation to pay under the contract, but claims that this obligation is limited to the estimated amount of freight. This is recognized in the opinion of Judge Ward in the case at bar when he says (Record, p. 28):

"The respondent does not seek to repudiate the charter."

The Jureidini case interpreted in a later decision. That the above analysis is correct appears from a case decided by the English Court of Appeal in 1919.

Woodall v. *Pearl Assurance Co., Ltd.*, 24 Comm. Cases, 237. 1919 1 K. B 59

That was also an action on an insurance policy, containing an arbitration clause which read as follows (p. 237):

"If any question shall arise touching this policy or the liability of the company thereunder * * * the assured and all persons claiming through the assured * * * shall be bound if the company so require to refer the same to arbitration * * * and no person shall be entitled to bring or maintain any action or proceeding on this policy except for the sum awarded under such arbitration."

It will thus be noted that the arbitration clause, like the arbitration clause in the case at bar, related to all matters in dispute, not, like the arbitration clause in the *Jureidini* case, to the amount of damages only.

The insurance company refused to pay for the loss of life under the policy, on the ground that the insured had misstated material facts. Thus, the case is stronger than the case at bar, for if the assured there misstated material facts, the policy would become void.

In the case at bar the petitioner admits the validity of the charter and merely raises the point that under that charter it has the right to refuse the performance on paying the estimated amount of freight.

The Court held in the *Woodall* case that the insurance company admitted the existence of the insurance policy and was entitled to have the matters in dispute arbitrated, as a condition precedent to bringing suit.

Bankes, L. J., said (p. 243):

"In *Jureidini's* case, it is material to note what the policy provided in reference to arbitration and

in reference to any misdescription rendering the policy void. Clause 12 referred to a number of matters, one of which was a case of a false declaration having been made and used in support of the claim, and it provided that, in the event of the happening of any of these matters, all benefits under the policy should be forfeited. The arbitration clause was one which provided for arbitration as to the amount of any loss or damage, and was confined to the ascertaining of the amount of loss or damage if the dispute between the parties was as to loss or damage only. What happened there was, that the insurance company claimed that the policy had been forfeited. There was no dispute as to liability; they claimed boldly that the policy had been forfeited and that there was consequently no existing binding contract between the parties. Those being the circumstances, the matter proceeded, and the insurance company set up that the plaintiff had no right of action. That was the question which had to be decided, and which was ultimately decided in the House of Lords. The opinions of the Law Lords do not, I think, proceed upon quite the same grounds, but in every case the fact is made perfectly plain that the decision proceeds upon the ground that the dispute between the parties was not a matter which came within the arbitration clause at all, but that the position of the insurance company had been the position of a person who was repudiating his contract in the fullest sense and asserting that the policy had been forfeited. I do not think I need refer to the passages which have been so often read, either from the opinion of Lord Haldane or from that of Lord Dunedin or Lord Atkinson. I will just refer to *Stebbing's* case as being a good example of the second class of case to which I have referred, and I will refer to the language which was used by Viscount Reading, C. J., as making that point clear. At p. 436 of the report in (1917) 2 K. B., Viscount Reading, C. J., says this: 'But the phrase "avoiding the policy" is loosely used in reference

to the circumstances of this case. In truth the company is relying upon a term of the policy which prevents the claimant recovering'; and page 437 he says: 'In the present case the company are claiming the benefit of a clause in the contract when they say that the parties have agreed that the statements in question are material and that they induced the contract. If they succeed in escaping liability that is by reason of one of the clauses in the policy.' Now, here, as I have said, the real dispute between these parties was, whether the deceased man did originally correctly describe himself, because, if he did not, by the terms both of the proposal and of the policy itself, the policy would be voided; and, secondly, whether, assuming he correctly described himself, he had afterwards changed his occupation, in which case, by clause 8 of the policy, the policy would be void and no claim could be made. And, that being the dispute between the parties, there is an arbitration clause which provides that, 'if any question shall arise touching this policy or the liability of the company thereunder'—which those two questions which I have just mentioned are—then, if the company shall so require, the assured shall be bound to go to arbitration, and he (because he is included under 'no person') shall not be entitled 'to bring or to maintain any action or proceeding on this policy except for the sum awarded under such arbitration.' In my opinion, therefore, the company were right in their contention that in this particular case, having regard to the attitude which they took up and to the terms of the policy and the arbitration clause, they were entitled to say that this was a case which fell within the principle of *Scott* v. *Avery,* and that the plaintiff had no right of action unless and until the amount due to her was ascertained by arbitration."

Warrington, L. J., said (p. 248):

"But in my opinion *Jureidini's* case was quite a different case; in the first place, there was total

repudiation in *Jurcidini's* case; in the second place, the arbitration clause in *Jurcidini's* case did not extend to questions affecting liability under the policy; it only extended to differences as to the amount payable under it. The consequence is that, if the contention of the insurance company in that case had prevailed, there would have been no means at all of deciding the question as to the liability or non-liability of the insurance company by reason of the facts which they alleged. According to them, it could not have been decided by the Courts, and by the terms of the arbitration clause it could not have been decided by arbitration. That difficulty was pointed out by Lord Atkinson, and also by Lord Parmoor, and I think the same difficulty occurred to Lord Dunedin, as appears from the passages from his judgment which have been read to us."

We submit, therefore, that the *Woodall* case, decided since Judge Hough rendered his opinion, shows that the *Jurcidini* case does not prevent the petitioner from insisting on arbitration as a condition precedent.

Judge Ward's opinion in the case at bar. The arbitration clause in the case at bar is dealt with in Judge Ward's opinion in the Circuit Court of Appeals, which opinion is the opinion of the majority of the Court, on page 26 of the record, as follows:

"This clause cannot be regarded as a condition precedent to the maintenance of a subsequent suit in the courts because it provides that the arbitrators shall 'settle,' that is, dispose of the dispute."

We submit that the *Woodall* case, above referred to, shows that this statement is inaccurate. There arbitration under a general arbitration clause was

held to be just as much a condition precedent to suit as an arbitration clause relating to damages would be. It is stated in the answer and admitted by exception that, under the law of Sweden and Denmark, arbitration under this arbitration clause is a condition precedent to bringing suit in any court. If this statement had not been admitted by exception, we could have proved that, under the law of these countries, the matter would have to be arbitrated in accordance with the agreement of the parties and that the court would only interfere in the situation in case the party sued had refused to perform the arbitration award when made, or otherwise had violated his arbitration obligations.

Judge Ward proceeds to state (Record, p. 26) that the petitioner is not justified in insisting that the charterer cannot go into court, without submitting the case to arbitration, on the authority of *Hamilton* v. *Home Ins. Co.*, 136 U. S., 242. This is evidently the main point which the Court was leading up to in the passage quoted.

The *Hamilton* case held that where the insurance policy contains a clause that the damages must be arbitrated before suit can be brought upon the policy, the provision is valid. It may also be inferred from that case that the Court would have held that, if two Americans had provided in an insurance policy, as was done in the *Woodall* case, that all questions under the policy should be arbitrated as a condition precedent to suit, it would have held such a clause void as against public policy.

We very respectfully submit that it is illogical and not according to a broad commercial policy to say that arbitration agreements if they relate to damages are valid, but not if they relate to gen-

eral liability under the contract. We further maintain that even if this were not so, there is no reason why a United States Court, as a matter of public policy, should instruct the citizens of Denmark or Sweden what their law ought to be on this arbitration question or, what amounts to the same thing, allow action to be brought in the United States Courts, bring the matters in dispute to a valid judgment, and thus absolutely nullify the agreement to arbitrate which the laws of Denmark and Sweden hold to be a binding agreement.

There is no such public policy.

The important point to note here is that this agreement to arbitrate, in this particular case, is admitted by the pleadings to be a condition precedent to the bringing of suit. If this Court, in spite of this, allows the suit to be brought, it is not because arbitration is not a condition precedent, but because this Court on the ground of public policy or for some other reason holds that it ought to allow a citizen of Denmark to wholly disregard this provision of the law of his country which would prevent him from bringing suit before arbitration.

6. PUBLIC POLICY DOES NOT REQUIRE THE NULLIFICATION OF VALID AGREEMENTS TO ARBITRATE MADE IN FOREIGN COUNTRIES.

The leading English authority. That public policy in Scotland does not require the courts to nullify arbitration agreements, if valid by the laws of the country where made, is well settled.

Hamlyn v. *Talisker Distillery,* L. R. (1894), A. C., 202.

Under the laws of both England and Scotland, contracts to arbitrate were for a time considered void as against public policy. At the present time, the contrary rule has been established in England, through court procedure, the courts having authority in their discretion to stay proceedings in court, where contracts contain an arbitration clause. In Scotland, however, the old idea of public policy remains the law.

In the *Hamlyn* case, decided on appeal from a Scotch Court by the House of Lords, a contract signed in London between an English and a Scotch firm provided for arbitration, the clause being invalid by Scotch law. When suit was brought in Scotland the defense was raised that the case had to be arbitrated, and the Court held that the case was governed by English law; that it would enforce the English law, and that the arbitration agreement was a matter of right. It drew this clear distinction that the right to have an arbitration *is a matter of right*. The Court admits that, when a Court does take jurisdiction, then its procedure is a matter of remedy and that it will follow its own rules and not be governed by those of a foreign country. Otherwise the Court would be unduly hampered. But it points out that the question whether the Court should or should not take jurisdiction is not a question of its forms of procedure but *is a matter of right* about which the parties contract.

On page 210 Lord Herschell said:

"But then it is argued that an agreement to refer disputes to arbitration deals with the remedy and not with the rights of the parties, and that

consequently the forum being Scotch the parties cannot by reason of the agreement into which they have entered interfere with the ordinary course of proceedings in the Courts of Scotland. Stated generally, I should not dispute that proposition so far as it lays down that the parties cannot, in a case where the merits fall to be determined in the Scotch Courts, insist, by virtue of an agreement, that those Courts shall depart from their ordinary course of procedure. But that is not really the question which has to be determined in the present case. The question which has to be determined is whether it is a case in which the Courts of Scotland ought to entertain the merits and adjudicate upon them. If it were such a case, then no doubt the ordinary course of procedure in the Scotch courts would have to be followed; but the preliminary question has to be determined whether by virtue of a valid clause of arbitration the proper course is for the Courts in Scotland not to adjudicate upon the merits of the case, but to leave the matter to be determined by the tribunal to which the parties have agreed to refer it. Viewed in that light, I can see no difficulty; and the argument that to give effect to this arbitration clause would interfere with the course of procedure in the forum in which the action is pending seems to me entirely to fail."

In short, the Court decided that the Scotch Courts must not enforce their own public policy in regard to arbitration, but must apply the law of the country governing the contract.

The arbitration clause in the case at bar similarly a matter of right. In the case before us the question was similarly not one of the Court's procedure, after taking jurisdiction, but a question whether the Court would take jurisdiction; a question of the right of the parties to insist upon arbitration as provided by the contract.

Matters of remedy and of right. It would not be in accordance with the principles of sound jurisprudence to allow the rules of procedure of a foreign country to be imposed upon United States Courts in the conduct of cases of which they take jurisdiction, even if such foreign procedure is proved or admitted. This sound principle has given rise to the common phrase that if a matter relates to remedy, "not right," foreign law will not be enforced. The phrase must always be construed in the light of the principle of law on which it is based. It applies only to cases where the Court takes jurisdiction and the procedure thereafter adopted. The right to arbitrate is not a matter of procedure or "remedy" within this principle of law. It is a right given by the law of a foreign nation. Our Courts cannot in any way be hampered in the administration of justice by rules of foreign procedure, by recognizing this right. In doing so they recognize the valid law of a foreign country, and take no jurisdiction whatsoever.

The above distinction is made clear in the case of *Hamlyn* v. *Talisker Distillery* (*supra*).

7. THE CONTENTION THAT THE NON-PERFORMANCE CLAUSE AND ARBITRATION CLAUSE DO NOT RELATE TO A CASE OF NON-PERFORMANCE BUT ONLY TO A CASE OF DEFECTIVE PERFORMANCE.

Judge Ward in his opinion in the Court below said (p. 28):

"The respondent does not seek to repudiate the charter, but contends that it authorizes a withdrawal at any time. To us, however, both clauses 21 and 24 seem to contemplate disputed breaches

by either party during the performance of the charter-party and not a refusal of either party to perform at all."

This quotation shows that the petitioner did not make clear its position to the Court. The petitioner did not contend that the non-performance clause related to a case of partial performance. The clause, "penalty for non-performance of this agreement," seems specially to relate to a case where the charter is not at all performed. Possibly the clause might also refer to a case of partial performance, but that is not necessary to pass on here, as it was a case of non-performance.

The arbitration clause also seems broad enough to cover the situation. It reads: "If any dispute arises the same to be settled, etc."

We submit, therefore, that Judge Ward was in error in holding that the two clauses when construed together showed that only partial breaches were to be arbitrated.

8. ARBITRATION WOULD HAVE WORKED OUT IN A PRACTICAL MANNER IN THE CASE AT BAR.

The courts will always be one of the greatest, if not the greatest, force for the maintenance of order in a community. They must necessarily be the final arbiter in disputes between parties which are not settled otherwise. If parties will not abide by an arbitration award, the courts must enforce it, if the arbitration is binding. The procedure of the courts, however, is formal and takes time. The case at bar arose in 1914. Although the delay in settlement is in large measure due to the fault of the parties, much delay in the courts is inevi-

table. It is believed that the courts generally look with favor on settling such disputes as can be settled by business arbitration. In the case at bar, the captain at the port of loading would have appointed one arbitrator and the charterer another. The arbitration clause provided that in case of a disagreement they should appoint an umpire. The owner clearly felt that his liability for non-performance was limited to freight, but he recognized that the charterer disagreed with him. The owner was ready to do anything reasonable, and would have allowed his vessel to proceed at the market rate if an arbitration had been decided in his favor. This appears from the correspondence annexed to the libel. It is advantageous to settle disputes in this way rather than to have the vessel actually withdrawn and large damages incurred, as the only method of settling the dispute between the parties. Here the charterer began suit the moment the vessel arrived, without arbitrating.

SECOND POINT.

Limitation of liability to estimated amount of freight.

We submit that this Court will hold that this case should have been arbitrated and will refuse to consider the merits of the controversy. In case of a contrary decision, the points to be considered are as follows:

The issue. In the charter-party there is a provision that the penalty for non-performance of the agreement is proved damages not exceeding the estimated amount of freight. An unusual condi-

tion of the freight market so altered rates that at the time of performance the damages were greater than the freight. The shipowner failed to carry out his contract, and the question arose as to the validity of the limitation.

Nothing immoral or unfair in having the parties limit the damages to a given amount. When parties limit their damages, in case of a breach of contract, to an amount agreed upon, there should be no complaint when the breach occurs. There may be large fluctuations at any time in charter rates and in the risk to be run by a vessel in making a given voyage. This is peculiarly the case in time of war, and the owner of a vessel may reasonably wish to insert a clause to limit his obligations in case of any contingency which materially affects his obligations. The restraint of princes clause is a clause of this character; so are war clauses. The parties might have inserted a clause which would have justified the owner in refusing to perform, without making any payment whatever, in case of submarine blockade, which blockade began after signing and before performance. Instead they inserted a clause which justified refusal to perform on paying the estimated amount of freight.

The limitation clause in the case at bar. The clause here was as follows:

"24. Penalty for non-performance of this agreement to be proven damages, not exceeding estimated amount of freight."

The right to limit clear. There is no reason *in law* why the parties, if they chose, should not enter into an agreement that the penalty for non-per-

formance of the agreement should be the proven damages not exceeding the estimated amount of freight. The only question is whether they have used appropriate language to express that idea. The majority of the Circuit Court of Appeals said in its opinion (p. 28):

"No doubt the parties could agree that either might deliberately and for his own interest withdraw entirely from the charter and be responsible for no more than the estimated amount of freight."

The District Judge said (p. 21):

"Of course the parties might have agreed to limit him, but there is no apparent reason for supposing that such a formal and mechanical equality was within their contemplation."

To the same effect see *Watts* v. *Mitsui & Co., Ltd.* (1917), 22 Commercial Cases, 242, a case followed here by the Court below, where the House of Lords by dictum (Lord Dunedin, pp. 252, 253) declared a similar limitation clause invalid. Lord Finlay said (p. 246):

"I agree with the construction put in the Courts below on Clause 13—the penalty clause. If this clause had appeared for the first time, I think it might have been construed as imposing a limitation on the damages to be recovered, * * *."

The meaning of the old penalty clause. The old penalty clause read, "penalty for non-performance of this agreement estimated amount of freight." Its meaning was clear, that if a man voluntarily or negligently broke the charter, he must pay the sum fixed as a penalty. The actual damages might be greater or less. In so far as it served as a limitation, the clause would have been valid; but

because it served also as a penalty, requiring more than actual damages to be paid, the same amount whether the breach was partial and slight or total and severe, the clause in that form has always been held invalid.

Watts v. *Camors,* 115 U. S., 353.

How to modify the old penalty clause to make it valid. Charter-parties and bills of lading have almost invariably grown by modifications of existing forms. Negligence and other exemption clauses have been criticized by the courts and their form modified to meet such criticisms. In a note to *The Glenfruin,* in *Scrutton on Charter-Parties,* 8th Ed., p. 90, Judge Scrutton, referring to two exceptions in a bill of lading, says: "These two exceptions bear the mark of *The Glenfruin* (1885), 10 P. D., 103." Any shipping man wishing to retain the valid limitation feature of the old penalty clause would naturally do so by eliminating the objectionable feature, the possibility of an award greater than the actual damages. The clause would then read: "Penalty for non-performance proved damages, not exceeding the estimated amount of freight." That is the clause in the case at bar. With the clause thus modified, the objectionable feature criticized by the courts is eliminated.

The word "penalty" calls attention to the fact that the breach may be voluntary. One point more. The word "penalty" renders a distinct service in this clause. The libelant's proctor has expressed surprise at the wilful manner in which the owner deliberately broke the contract. The word "penalty" should have prevented such surprise. It is

the word which we use when we ask what we will suffer if we commit a breach of obligation voluntarily. We ask what will be the "penalty" for failing to hold an annual meeting of a corporation or file a tax return. We wish to know what will be the consequences if we *voluntarily* and *deliberately* fail to do the act.

Even without the word "penalty" it is well settled that it makes no difference whether the breach is voluntary or not.

> *Winch* v. *The Mutual Benefit Ice Co.*, 9 Daly (N. Y.), 177, particularly at pp. 181, 182. Affirmed in all respects, but with the addition of interest, 86 N. Y., 618.
>
> *Alpha Portland Cement Co.* v. *Davis*, 134 Fed., 274, particularly at p. 280. Affirmed 142 Fed., 74 (C. C. A., 3rd Circuit.)

The courts do not construe a clause as a penalty clause because it contains the word "penalty." It is only a penalty clause if it provides for more than the actual proved damages.

> *U. S.* v. *Bethlehem Steel Co.*, 205 U. S., 105.

On the general subject, see also:

> *Sun Printing & Publishing Assn.* v. *Moore*, 183 U. S., 642.
>
> *Wise* v. *United States*, 249 U. S., 361.

The limitation clause made the risk run by both parties, in case of a voluntary breach, the same. During the war changed conditions, after the con-

tract was made, often make it grossly unfair that the parties should perform a charter for the amount stipulated. From the nature of the case, the limit of the charterer's liability to the owner, if he voluntarily refused to perform, was the estimated amount of freight. That was all that the owner could get out of the charter in any case. But changed conditions in hostilities frequently made the charters of vessels, which ran the risk of being sunk, many times greater than the amount originally stipulated in the contract. Unless a shipowner had absolutely bound himself by contract, it was very unfair that he should perform the voyage for a sum which would not compensate him for the risks he ran. A prudent owner might properly want to know what penalty he would have to pay if under changed conditions he refused to perform the contract at a terrific loss. He might properly insert a limitation clause by which he would have to pay the same amount for a breach that the charterer would have to pay if *he* made a voluntary breach, that is to say, proved damages not exceeding the estimated amount of freight.

The amount of the limitation clause a reasonable one. In the court below, the proctor for libelant objected to the limitation clause because of its amount, apparently because it was not the same amount as the actual damages. But the whole purpose of the limitation is to fix an amount beyond which the damages shall not go. The amount chosen was thought by both parties to be the monetary value of the contract when they made it, which gives a ground for choosing the amount, and it also puts the parties on an equality, as above stated.

Theory of the Court below that the old penalty clause was modified with the intention of making no modification in it. The Circuit Court of Appeals cited *Wall* v. *Rederiaktiebolaget Luggode* (1915), 3 K. B., 66, and the dictum approving it in *Watts* v. *Mitsui & Co.* (*supra*) as its authority for holding the limitation clause invalid, and incorporated part of Judge Swinfen Eady's opinion in the *Watts* case in its own opinion (Record, p. 27). Judge Swinfen Eady states that Judge Bailhache in the *Wall* case thought the modification of the old penalty clause did not modify it in any way, but he himself claimed that there was a theoretical distinction. Suit in England, he said, could be brought on the penalty clause or for general damages. If libelant sued under the old penalty clause or under the modified clause, he could collect only his actual damages, not to exceed the penalty; if he sued for general damages, he would recover the full damages. So far they were alike. But Judge Swinfen Eady makes this distinction, that in English practice, under the old penalty clause, the judgment would be for the amount of the penalty but execution would be limited to the actual damages proved, while under the modified clause the judgment would be for the actual damages proved, not exceeding the penalty. In England no one sues on the penalty clause, as Judge Bailhache expressly stated in the *Wall* case, p. 73, so that even this fine distinction does not exist for practical purposes, and in America no one can sue on the penalty clause, if it be a penalty clause, for penalty clauses are held invalid. Even in England, Bailhache, J., referred to the substitution of this modified clause as an "idle task" (Report of Case, 1915, 3 K. B., at p. 74). Is it not difficult to

suppose that commercial men in England, America or Denmark, where the contract was made, would take these legal technicalities, which they did not know of, into account? Would they not think that the clause means just what it says, that in case one of the parties refused to perform the contract, the other could recover proved damages, not to exceed the freight?

Every sentence in the instrument should be given effect. Judge Bailhache's decision violates the principles of law which prevail in this country relating to the construction of instruments. He plainly states that he infers that the parties were engaged in the idle task of modifying a well-known dead letter clause so that it might still remain a dead letter. It is submitted that, in spite of the continuous modification of charter-parties and bills of lading that has always taken place, not a single instance of such an "idle task" could be cited. The following well-known authorities show that to assume that the parties could do such an act is in direct conflict with well-established rules of construction:

"All parts of the writing and every word in it, will if possible be given effect" (9 *Cyc.*, 580).

"Every clause and even every word shall be given effect if this is in any way possible" (17 *Am. & Eng. Encyc. of Law,* 2nd Ed., p. 7).

"It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance" (Lord Chancellor Cairns in *Bowes* v. *Shand,* 2 App. Cas., at p. 463, *quoted by the Supreme Court in Norrington* v. *Wright, 115 U. S., 188*).

"The four corners of the instrument must be examined to ascertain the meaning of any of its stipulations, and each of them must be construed so as to give effect to all, if possible" (*Cleveland Iron Co.* v. *East Itasca Min. Co.*, 146 Fed., 232, 235; C. C. A., 8th Circuit).

Special attention should be given to new matter. This doctrine is clearly set forth by Judge Putnam, sitting in the Circuit Court of Appeals in the First Circuit, in the case of *W. K. Niver Coal Co.* v. *Cheronea S. S. Co.*, 142 Fed., 402, at 404:

"Charters, like nearly all maritime documents, can be properly construed only when construed historically. The common practice when changes have been desired in charters, marine insurance policies, and other maritime documents, has been to insert into the old body a new clause supposed to have reference to the particular emergency which it concerned. Thus it follows that inconsistent expressions are found in such documents; and so it is in the present case. *Scrutton's Charter-Parties and Bills of Lading* (5th Ed., 1904), at page 22, pertinently says: 'It is unnecessary to find a meaning in the particular charter for every word of a common printed form.' When a maritime document is studied historically, the necessity of complete reconcilement at times disappears, and what is introduced as new matter masters the rest of the document, on the same principle that written words master the rest of a printed blank deed, or contract, into which they have been inserted."

The new matter, inserted in the penalty clause, must control.

If there is any doubt in the construction of the charter, it should be construed against the charterer. The charter is a Danish charter; the head-

ing is that of Hecksher & Son, the charterer's brokers (see Schedule A, inserted at p. 4 of the record). The steamship owner was a resident of Sweden and the letters which have been introduced in evidence on behalf of the charterer show that when performance was refused, notice was given to the charterer's agents, Hecksher & Son, at Copenhagen, Denmark, where the charterer resided (Schedule B, pp. 8 and 9).

Conclusion. The meaning of the clause is clear. We cannot keep too clearly in mind that there is but one point in this branch of the case. What is the meaning of this clause? It is perhaps more a matter of common sense than law. Does this language mean that the parties are to recover their proved damages, not exceeding the estimated amount of freight? If it does, that is a perfectly legal agreement to make.

We also call attention to the fact that, in the present case, the libelant has shown his insistence upon legal rights, by trying to force this case in the courts, in spite of his solemn promise to arbitrate every matter in dispute, and he should not complain of the enforcement of a clause in the contract which limits the recovery to the amount of freight.

If we read this clause as a business man would, do we not know that there is no ambiguity in it; that it clearly provides that proven damages shall be recovered, not exceeding the estimated amount of freight?

LAST POINT.

The decree of the Circuit Court of Appeals in favor of the libelant should be reversed and the case remanded to the District Court to enter judgment for the respondent dismissing the libel, with costs.

February 18, 1920.

Respectfully submitted,

HAIGHT, SANDFORD, SMITH & GRIFFIN,
Proctors for Petitioner.

CLARENCE BISHOP SMITH,
Counsel.

APPENDIX.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

FRANK C. CLARK,
Plaintiff,

against

HAMBURG-AMERICAN PACKET COMPANY,
Defendant.

WARD, *J.*

The stipulation in the charter party that all disputes were to be settled by unnamed arbitrators in London was not a provision regulating the remedy incidental to the contract, but was a substantive part of the contract itself. If the charter had been made in New York such a provision would not be valid, *Delaware & Hudson Canal Co.* v. *Penna. Coal Co.*, 50 N. Y., 250. But the demurrer admits that the charter was made in Germany between a German corporation and a citizen of the State of New York, and that the provision as to arbitration is valid by the law of Germany. The principal dispute is whether the defendant should have supplied a la carte dinners, as distinguished from table d'hote dinners. If this was a breach of the contract it was a breach committed on the ship, which is a part of German territory and generally while on the high seas. Arbitration of particular

controversies is recognized under certain conditions in New York, Code of Civil Proc., Secs. 2365-2386. I think this provision in the contract is a good plea in bar to an action in the courts of this state, *Hamlyn* v. *Talisker* (1894), App. Cas. 202. The demurrer is overruled with costs.

April 15, 1913.

U. S. J.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1919

No. 171

REDERIAKTIEBOLAGET ATLANTEN,
Petitioner-Respondent

AGAINST

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET,
Respondent-Libellant

BRIEF FOR RESPONDENT-LIBELLANT

FIRST POINT

THIS SUIT DOES NOT PROPERLY INVOLVE THE ARBITRATION CLAUSE OF THE CHARTER-PARTY BECAUSE THE PETITIONER CANCELLED THE CHARTER-PARTY AND MADE NO DEMAND FOR ARBITRATION.

The charter clause on which the petitioner rests its case reads:

"21. If any dispute arises the same to be settled by two referees, one appointed by the Captain and one by charterers or their agents, and if necessary, the arbitrators to appoint an Umpire. The decision of the arbitrators or

Umpire, as the case may be, shall be final, and any party attempting to revoke this submission to arbitration without leave of a court, shall be liable to pay to the other, or others, as liquidated damages, the estimated amount of chartered freight" (Trans. p. 7).

This provision should not influence the decision of the case, because the petitioner deliberately "cancelled" the charter-party; neither the petitioner nor the captain of the *Atlanten* requested arbitration of any dispute, but, on the contrary, the petitioner indicated its intention that the matter be decided by the courts; and the cancellation put an end to the arbitration clause as well as all other clauses of the charter-party.

January 8, 1915, the petitioner wrote the respondent partly as follows:

"We regret to advise that we are compelled to cancel the *Atlanten's* charter-party Pensacola to Scandinavia, and are ready to take all the consequences the court after clause No. 21 [24] in the charter-party will compel us to pay, not exceeding the estimated amount of freight" (10).

The respondent wrote the petitioner January 13, 1915, stating that the petitioner had cancelled the charter-party (11). January 14 the petitioner replied and concluded by stating: "We have now definitely decided to cancel the charter-parties" (13)—the correspondence dealt also with the charter-party of another steamer not involved in this suit.

This correspondence is not set forth in the briefs filed by the petitioner and by the New York Chamber of Commerce.

We think that the effect of this correspondence, which shows that the petitioner deliberately cancelled the whole

charter-party (including the arbitration clause) and evidenced its intention to let the case be decided by the Court, is to close the door to consideration of arbitration, which is for this case merely a moot question. Certainly it will not be argued seriously that the captain of the steamer (merely an agent of the petitioner for the purpose of carrying out the physical steps required for performance of the charter-party) could revive the charter-party and initiate an arbitration after the petitioner itself had cancelled the charter-party and thus deprived the captain of all authority to act under it; if he could, it is enough to say that he did not. Indeed, the construction of the arbitration clause is such that it could be applicable only to disputes arising in the course of loading or discharging or otherwise in connection with the performance of the main purpose of the charter, which was to load, carry and deliver the cargo.

After suit brought it was too late for the respondent to insist on arbitration, it having theretofore rejected arbitration specifically with its rejection of the whole contract. The case is within the spirit of Mr. Justice Swayne's language in *Railway Co.* v. *McCarthy*, 96 U. S. 258, 267-268:

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law. *Gold* v. *Banks*, 8 Wend. (N. Y.) 562; *Holbrook* v. *White*, 24 *id.* 169; *Everett* v. *Saltus*, 15 *id.* 474; *Wright* v. *Reed*, 3 Durnf. & E. 554; *Duffy* v. *O'Donovan*, 46 N. Y. 223; *Winter* v. *Coit*, 7 *id.* 288."

The disabilities of the repudiating party are further illustrated by the decisions holding that refusal to perform the contract on one ground waives other grounds of objection. In *Empire Implement Mfg. Co.* v. *Hench*, 219 Pa. St. 135, the owner of a patent by his agent made a contract with the defendant whereby the defendant was to sell grinding machines, the owner agreeing to secure patents in various foreign countries where the machines should be sold by the defendant. Before these foreign patents could be secured the defendant repudiated the contract on the ground of lack of authority of the owner's agent. The defense was raised that the foreign patents had not been secured. The Court said at page 145:

"A sufficient reason why the point should have been refused is that the contract was not repudiated because the patents had not been protected in the countries in which the machines were to be sold. On July 22, 1899—barely two months from the time it was delivered by Jones to the appellee—and before the latter could reasonably have been expected to have the patents protected in all of the countries named, the appellants repudiated the contract on the sole ground of want of authority in Jones to make it."

In *Braithwaite* v. *Foreign Hardwood Co.* [1905] 2 K. B. 543, the buyers repudiated a contract for the sale of rosewood to be delivered at Hull in instalments during 1903, and refused to accept any rosewood under it on the ground that the seller had broken a collateral oral agreement not to supply rosewood that year to any other person in the trade. The buyers refused to accept the bill of lading for both the first and second consignments tendered to them, and the seller brought action for damages. Later the buyers became aware that part of the rosewood in the

first consignment was not of the contract quality. The Court of Appeal held that by refusing to take delivery of the consignments when tendered on the ground that they had already repudiated the entire contract (the repudiation having been found to be wrongful) the buyers had waived performance of conditions precedent by the sellers, who were entitled to collect as damages the difference between the contract price of the rosewood and the lower price at which they had sold it. Collins, *M. R.*, said, at page 551:

"In the present case, after there had been a general repudiation of the contract by the defendants, the plaintiff's agent informed them that he had received the bill of lading for the first instalment; but the defendants again wrote refusing to take the bill of lading on the ground that they had previously repudiated the whole contract and refused to be bound by it. In my opinion that act of the defendants amounted in fact to a waiver by them of the performance by the plaintiff of the conditions precedent which would otherwise have been necessary to the enforcement by him of the contract which I am assuming he had elected to keep alive against the defendants notwithstanding their prior repudiation, and it is not competent for the defendants now to hark back and say that the plaintiff was not ready and willing to perform the conditions precedent devolving upon him, and that if they had known the facts they might have rejected the instalment when tendered to them."

See also *Life Ins. Co.* v. *Pendleton*, 112 U. S. 696; *Grattan* v. *Metropolitan Life Ins. Co.*, 80 N. Y. 281; *Clarkson* v. *Western Assurance Co.*, 92 Hun, 535; *Hicks* v. *Assurance Co.*, 13 A. D. 448; *Robinson* v. *Frank*, 107 N. Y. 656; *Smith* v. *Wetmore*, 167 N. Y. 234; *Honesdale Ice Co.* v. *Lake Ladore Improvement Co.*, 232 Pa. St. 293.

The House of Lords has held that repudiation of a contract makes an arbitration clause inapplicable.

In *Jureidini* v. *National British & Irish Millers Ins. Co. Ltd.*, [1915] A. C. 499, Lord Chancellor Haldane said, at page 505:

"Now, my Lords, speaking for myself, when there is a repudiation which goes to the substance of the whole contract I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced."

In that case the Insurance Company denied liability on its policies on the ground that the loss was caused by the felonious acts of the assured, charging arson and contending that the claim was fraudulent. The policy contained an arbitration clause to the effect that going to arbitration was a condition precedent to the right to sue.

The Lord Chancellor also said, at pages 505, 506:

"There has been in the proceedings throughout a repudiation on the part of the respondents of their liability based upon charges of fraud and arson, the effect of which, if they are right, is that all benefit under the policy is forfeited. But one of the benefits is the right to go to arbitration under this contract, and to establish your claim in a way which may, to some people, seem preferable to proceeding in the Courts; and accordingly that is one of the things which the appellants have, according to the respondents, forfeited with every other benefit under the contract." * * * "The jury found that the case of fraud and arson had broken down: they found for the plaintiffs upon those issues, and the learned judge gave judgment, not that the case should go to arbitration, but for 3000 £; and I think that was probably right, the arbitration clause having gone with the repudiation."

And Lord Dunedin said, at page 507:

"It seems to me that when the attitude was taken up by these parties, which was taken up in the letters

which have been read to us which the Lord Chancellor has referred to, in England,—that they repudiated the claim altogether and said that there was no liability under the policy,—that necessarily cut out the effect of clause 17 as creating a condition precedent against all forms of action."

We do not see wherein the petitioner's attempted distinction of the *Jureidini* case affects the proposition which it states, notwithstanding *Woodall* v. *Pearl Assurance Co. Ltd.*, 24 Com. Cas., 237, cited by the petitioner. It is submitted that the petitioner's cancellation of the charter was an absolute and complete repudiation of it. The offer to pay a penalty or damages according to clause 24 cannot be considered performance. The contract was on the part of the respondent to ship a cargo and pay freight, and on the part of the petitioner to receive and transport the cargo, and that was the contract which the petitioner repudiated.

There are many other instances of contract limitations displaced by repudiation.

In *O'Neill* v. *Supreme Council, American Legion of Honor*, 70 N. J. L., 410, 422, 423, where the Council reduced the amount payable under an outstanding benefit certificate from $5,000 to $2,000, Mr. Justice Pitney said concerning a limitation of one year for bringing action:

"When the defendant, on its part, broke the contract, it absolved the plaintiff from the obligation thereof and the action to recover damages for such abrogation is not subject to any limitation that arises solely out of the terms of the contract that has been abrogated."

In *Strom Bruks Aktie Bolag* v. *Hutchison,* 6 Sess Cas., 5th Ser. 486, 10 Asp. M. C. 138, a charter-party contained the following clause:

"Penalty for non-performance of this agreement, estimated amount of freight on quantity not shipped in accordance herewith."

The owners wholly failed to furnish a vessel for one of the shipments. Lord Ordinary Kyllachy said at page 488:

"I see nothing to take the case out of the general rule that a penalty clause attached to a charter does not deprive the shipper of his option to have his damage assessed at common law. I consider further that, even if the clause falls to be read as stipulation for liquidated damages, it is not, on its just construction, applicable to a total failure by the shipowner with respect to one of the shipments stipulated."

The deviation cases further illustrate the effect of repudiation on contract exceptions and limitations. In *Scrutton on Charter-Parties,* 8th Ed., p. 250, it is said:

"The effect of deviation is to displace the special contract of the charter party or bill of lading, together with all exceptions therein. The shipowner will, therefore, be liable to the charterer or cargo owner for any loss or damage which the goods sustain, unless he can show that the loss or damage was occasioned either by the act of God, or by the King's enemies, or by inherent vice of the goods, *and* that the said loss or damage must equally have occurred even if there had been no deviation. And it is immaterial whether the loss or damage arises before, or during, the deviation, or after it has ceased.

In *Joseph Thorley Ltd.* v. *Orchis S. S. Co.,* [1907] 1 K. B. 660, it was held that because the steamship *Orchis* had deviated from the voyage described in the bill of

lading, which was from Limassol to London, her owners could not take advantage of an exception clause excusing them from liability for neglect or default of stevedores. To the same effect is *James Morrison & Co. Ltd.* v. *Shaw Savill & Albion Co. Ltd.*, [1916] 2 K. B. 783, where the shipowner was held liable for loss of wool cargo due to the vessel being torpedoed, because she had deviated.

Likewise, bill of lading clauses limiting liability to a certain amount are displaced by deviation. In *Balian* v. *Joly Victoria & Co.*, 6 Times Law Reports, 345, the bill of lading contained a clause limiting liability to £5 per package unless a greater value was declared. Tobacco shipped at Lagos arrived in London by another ship and another route than that contemplated in the bill of lading. The Court of Appeal held the deviation an answer to the defense made by the shipowner to a damage claim, that value in excess of £5 per package had not been declared.

The result reached by the foregoing decisions may be explained by saying that consideration has failed by act of the repudiating party, and that therefore there is no consideration for the other party still being bound; or it may be said that the repudiating party has failed to perform a condition precedent, *i. e.*, performing the contract or attempting to do so (as in the *Clark* case, Appendix to petitioner's brief), which alone will enable him to avail of the provisions of the contract. The right to avoid defenses asserted by a party whose repudiation has deprived of consideration the contract in which the asserted defenses are contained is analogous with the right to recover back or to refuse payment of money under a contract the consideration of which has failed or never existed. *Nash* v. *Towne*, 5 Wall. 689, 701-702.

SECOND POINT

ARBITRATION AFFECTS THE REMEDY ONLY, AND THEREFORE THE PROCEDURE THAT MIGHT HAVE BEEN FOLLOWED IN SWEDEN OR DENMARK IS IMMATERIAL IN THIS CASE, OUR LAW BEING THAT ARBITRATION AGREEMENTS DO NOT BAR OR OUST THE JURISDICTION OF OUR COURTS.

The proposition that an arbitration clause which has the effect of disposing of all matters in controversy, including questions of liability as well as of fact, will not be enforced against the objection of one of the parties to the contract need not be discussed at length, because it has been firmly established by the decision of this Court in *Hamilton* v. *Home Ins. Co.*, 137 U. S. 370, where a policy of fire insurance provided:

"In case differences shall arise touching any loss or damage, after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the Company under this policy."

The plaintiff refused to submit to an award of arbitrators in accordance with this provision. Mr. Justice Gray held that this arbitration clause did not bar the plaintiff's action, and said, at page 385:

"A provision, in a contract for the payment of money upon a contingency, that the amount to be paid shall be submitted to arbitrators, whose award shall be final as to that amount, but shall not determine the general question of liability, is undoubtedly valid. If the contract further provides that no action upon it shall be maintained until after such an award, then, as was

adjudged in *Hamilton* v. *Liverpool, London & Globe Ins. Co.*, above cited, and in many cases therein referred to, the award is a condition precedent to the right of action. But when no such condition is expressed in the contract, or necessarily to be implied from its terms, it is equally well settled that the agreement for submitting the amount to arbitration is collateral and independent; and that a breach of this agreement, while it will support a separate action, cannot be pleaded in bar to an action on the principal contract."

The arbitration clause in this case purports to dispose of all questions, whether of fact or law. The provision is that any dispute is to be "settled" and that the decision of the arbitrators "shall be final".

The authorities were reviewed by Judge Hough in the Southern District of New York in *U. S. Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co. Ltd.*, 222 Fed. Rep. 1006. In a subsequent motion in the same case (opinion unreported) Judge Hough said:

"The fact that the respondent and the impleaded party are both English is unimportant. The rule regarding arbitration agreements which wholly oust jurisdiction is of the forum, *i. e.*, relates to remedy, not to right. Motion denied.'

In *Meacham* v. *Jamestown, F. & C. R. R. Co.*, 211 N. Y. 346, a building contract conferred upon an arbitrator power to determine the effect of any stipulation in the contract and whether or not there had been performance, and to decide all matters in dispute arising out of the contract. The contract was made in Ohio, the contracting parties were Pennsylvania corporations, and the work, construction of a section of railroad, was to be done in Pennsylvania. This provision for arbitration was valid in Pennsylvania. The plaintiff, as assignee of the con-

tractor, brought action in New York to recover $30,079.29 for work performed and materials furnished, disregarding this provision for arbitration. Hogan, *J.*, said at pages 351-352:

"Tested by the principles of the cases cited, we conclude that the language employed in the contract in question is susceptible of but one construction, namely, an attempt on the part of the parties to the same to enter into an independent covenant or agreement to provide for an adjustment of *all* questions of difference arising between the parties by arbitration to the exclusion of jurisdiction by the courts.

Notwithstanding the decisions of the courts of Pennsylvania that the contract as to arbitration was valid and enforceable in that state, judicial comity does not require us to hold that such provision of a contract which is contrary to a declared policy of our courts (*White* v. *Howard*, 46 N. Y. 144; *Despard* v. *Churchill*, 53 N. Y. 192; *Faulkner* v. *Hart*, 82 N. Y. 413; *St. Nicholas Bank* v. *State Nat. Bank*, 128 N. Y. 26; *Marshall* v. *Sherman*, 148 N. Y. 9; *Dearing* v. *McKinnon, D. & H. Co.*, 165 N. Y. 78; *Hutchinson* v. *Ward*, 192 N. Y. 375) shall be enforced as between non-residents of our jurisdiction in cases where the contract is executed and to be performed without this state, and denied enforcement when made and performed within our state."

And Cardozo, *J.*, concurring, said, at pages 352-353:

"An agreement that all differences arising under a contract shall be submitted to arbitration relates to the law of remedies, and the law that governs remedies is the law of the forum. In applying this rule, regard must be had not so much to the form of the agreement as to its substance. If an agreement that a foreign court shall have exclusive jurisdiction is to be condemned (*Benson* v. *Eastern B. & L. Assn.*, 174 N. Y. 83; *Nute* v. *H. M. Ins. Co.*, 6 Gray, 174, 180; *Slocum* v. *Western Assur. Co.*, 42 Fed. Rep. 235; *Gough* v. *Hamburg Am. Co.*, 158 Fed. Rep. 174), it is not saved by a declaration that resort to the foreign court shall be deemed a condition precedent to the accrual of a cause of action. A rule would not long

survive if it were subject to be avoided by so facile a device. Such a contract, whatever form it may assume, affects in its operation the remedy alone. When resort is had to the foreign tribunal for the purpose of determining whether certain things do or do not constitute a breach, the cause of action must in the nature of things be complete before jurisdiction is invoked, and cannot be postponed by the declaration that it shall not be deemed to have matured until after judgment has been rendered. This must be so whether the tribunal is a court or a board of arbitrators. Indeed, the considerations adverse to the validity of the contract are more potent in the latter circumstances, for in the one case we yield to regular and duly organized agencies of the state and in the other to informal and in a sense irregular tribunals (*Mittenthal* v. *Mascagni,* 183 Mass. 19, 23). In each case, however, the fundamental purpose of the contract is the same: to submit the rights and wrongs of litigants to the arbitrament of foreign judges to the exclusion of our own. Whether such a contract is always invalid where the tribunal is a foreign court, we do not need to determine. There may conceivably be exceptional circumstances where resort to the courts of another state is so obviously convenient and reasonable as to justify our own courts in yielding to the agreement of the parties and declining jurisdiction (*Mittenthal* v. *Mascagni, supra*). If any exceptions to the general rule are to be admitted, we ought not to extend them to a contract where the exclusive jurisdiction has been bestowed, not on the regular courts of another sovereignty, but on private arbitrators. Whether the attempt to bring about this result takes the form of a condition precedent or a covenant, it is equally ineffective."

The exceptions filed to the answer do not admit that even in Denmark or Sweden suit could not have been brought without an arbitration first having been had. The allegations as to arbitration being a condition precedent are mere conclusions. Even if they were to be considered as established facts (for the purpose of the exceptions), their effect would be wholly overcome by the

petitioner's correspondence showing that it did not ask arbitration, but proposed that the courts should settle the matter.

The petitioner's suggestion that because both parties are foreigners jurisdiction of our courts should have been declined is without force now. Jurisdiction was taken, perhaps as a matter of discretion, but nevertheless properly taken, and in the absence of a clear showing of abuse of discretion the question whether jurisdiction should have been declined by the District Court is not open. *Goldman* v. *Furness Withy & Co.*, 101 Fed. Rep. 467, did not present an analogous situation. There Judge Brown declined to exercise jurisdiction in a suit involving a contract of carriage made and to be performed in Canada, but he distinguished *Barrow S. S. Co.* v. *Kane*, 170 U. S. 100, on the ground that the contract in that case involved transportation to New York. The fact that the contract in this case involved transportation of goods from this country is a sufficient reason for our courts taking jurisdiction of the dispute. See *The Belgenland*, 174 U. S. 355; *The Jerusalem*, 2 Gall. 191, Fed. Cas. 7293.

What the petitioner and the Chamber of Commerce apparently desire is that this arbitration agreement should have been specifically enforced. We find no authority for such relief on a contract of this nature, where irreparable damage or other grounds of equity jurisdiction cannot result from non-performance of the covenant, and it seems to be settled that the only relief for breach of a covenant to arbitrate is damages at law, which in most cases are merely nominal. *Munson* v. *Straits of Dover S. S. Co.*, 99 Fed. Rep. 787.

We do not deal separately with the various arguments presented in the brief filed by counsel for the New York Chamber of Commerce and in his book "Commercial Arbitration and the Law". An intelligent review of that book is found in the Harvard Law Review for March, 1919, Vol. 32, p. 584.

THIRD POINT

THE COURTS BELOW CORRECTLY DECIDED THAT THE PETITIONER'S LIABILITY WAS NOT LIMITED TO THE ESTIMATED AMOUNT OF FREIGHT.

Clause 24 of the charter provided:

"Penalty for non-performance of this agreement to be proven damages, not exceeding estimated amount of freight" (8).

The petitioner contends that its liability should have been limited to the freight payable by the respondent under the charter party if a cargo had been loaded and the charter-party performed. This limited amount is speculative and uncertain, being capable of determination only by loading of a cargo, until which time it could only be "estimated".

The reasons we have stated in the preceding point of this brief for non-applicability of collateral provisions of a contract which has been repudiated apply with equal force to clause 24, and we shall not repeat them here.

But if by any course of reasoning it should be supposed that clause 24 were still in the case, we are prepared to show that it does not limit the damages.

If the clause provides for a penalty, as its first word indicates, it is invalid. The petitioner does not contend that it is a provision for liquidated damages. Therefore it must show that the clause is a limitation of liability.

As for limitation of liability, the clause could hardly have been drawn worse, if that was its purpose. The liability limited (assuming that purpose) would apparently be that of the charterer to the shipowner, and not that of the shipowner to the charterer, since damages in terms of freight are intelligible only when understood as owner's damages for a charterer's breach. Moreover, the charter calls the clause a penalty. Perhaps this is not conclusive, but in *Tayloe* v. *Sandiford,* 7 Wheat. 13, 17, Chief Justice Marshall said:

"The parties themselves denominate it a penalty; and it would require very strong evidence to authorize the Court to say that their own words do not express their own intention."

The authority against the petitioner's contention is overwhelming.

In *Watts* v. *Camors,* 115 U. S. 353, 361, Mr. Justice Gray said:

"In such cases, accordingly, the courts of the United States, sitting in admiralty, award the damages actually suffered, whether they exceed or fall short of the amount of the penalty."

The District Judge reviewed the penalty clause carefully in the light of the authority existing at the time of his decision, and came to the following conclusion:

"To add to the penalty clause the words 'proven damages' changed nothing whatever; it merely made express what the law imposed in any event. There is therefore not the least reason for supposing that the addition of

these words in the charter party was intended to effect a limitation of liability; there was as much ground, when the penalty was in a stated sum, to argue that its presence necessarily implied that the parties intended to limit any liability as after the words were added. Yet we see that the courts did not accept that conclusion when the clause was in its earlier form. It seems to follow, therefore, that Mr. Justice Bailhache could not have reached a different result in *Wall* v. *Rederiaktiebolaget, supra,* from what he did, without disregarding the whole history of the clause" (20).

The English Decisions

Judge Hand's views are well supported by *Wall* v. *Rederiaktiebolaget Luggude,* [1915] 3 K. B. 66. After stating the history of the clause Judge Bailhache there said, at pages 73-74:

"Having got so far I ask myself, if I desired to perform the idle task of inserting a penalty clause in to a charterparty, and at the same time desired to express in words the true legal effect of such a clause instead of leaving the legal effect to be supplied by the parties themselves from their no doubt intimate knowledge of the statute of William, and if at the same time I desired to conciliate the conservatism with which commercial men always regard their familiar documents, how could that be done? Well, I must obviously take the common form and work upon that; I must add something, but as little as possible, to it; and the common form then very naturally takes the shape 'Penalty for non-performance of this agreement proved damages not exceeding the estimated amount of freight;' and that is clause 15 of this charterparty. Clause 15, therefore, is nothing more than the common form writ large. This seems to me to solve the question I have to decide, and to solve it in favour of the plaintiffs. Clause 15 is a penal clause and not a limitation of liability clause, and the plaintiffs are right in disregarding it."

The *Wall* case was approved by the House of Lords in *Watts, Watts & Co. Ltd.* v. *Mitsui & Co. Ltd.* [1917]

A. C. 227, which involved the same clause. At page 235 Lord Chancellor Finlay said:

"I agree with the construction put in the Courts below on clause 13—the penalty clause. If this clause had appeared for the first time I think it might have been construed as imposing a limitation on the damages to be recovered, but the penalty clause is an old one with a settled meaning, and the intention, if it existed, to make so fundamental a change in its effect as is suggested ought to have been much more clearly shown in order to bind the other party to the contract.

"In my opinion the judgment of Bailhache, *J.*, in the present and in the earlier case before him on this point were right."

At pages 244-245 Lord Dunedin said:

"This view makes the discussion as to the limitation of liability under the penalty clause of no practical importance. But I wish to say that had it been necessary to decide the point I should have only wished to express my approval of the admirable judgment of Bailhache, *J.*, in the case of *Wall*."

And at page 246 Lord Sumner said:

"My Lords, I have no doubt that clause 13 is a penalty clause and immaterial in the present case. To read it otherwise is to ignore the first word 'penalty'. True the use of that word is not decisive; but it is not impossible to read the residue of the clause as defining a mode of calculating a mere penal sum; and to read it as a limitation of the right to recover proved damages seems to me to produce an absurd result in business. Whatever the value of the cargo or the extent of the injury to it, the shipowner's liability in respect of it would be limited to the estimated amount of the freight, however that estimate is to be made. If the cargo owner is uninsured, he stands to lose large sums for the ship's default. If he is insured, he upsets the ordinary course of insurance business by depriving his underwriter of a valuable right of recourse, and must suffer for this in one way or another. Nothing could be less like a 'genuine covenanted pre-

estimate of damage'; *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.*, per Lord Dunedin. The whole matter has been fully and, if I may say so, admirably discussed by Bailhache, *J.*, in the recent case of *Wall* v. *Rederiakriebolaget Luggude*. Your Lordships decided the point in *Ströms Bruks Aktie Bolag* v. *Hutchinson* upon a somewhat similar clause, and I think that the present case cannot really be distinguished. My only difficulty is to understand why such a provision should be inserted at all."

When the *Watts* case, last cited, was before the Court of Appeal, [1916] 2 K. B. 826, this clause was discussed at some length. Swinfen Eady, *L. J.*, said, at pages 843-845:

"There remains the third point. It is contended that, having regard to clause 13 of the charter-party, the general damages recoverable are limited to £3,500, the estimated amount of freight. This clause is a little different from the clause which used formerly to be inserted in charter-parties. The old form was 'Penalty for non-performance of this agreement estimated amount of freight' There is no doubt that in such a case the estimated amount of the freight was a penalty. On proof of the breach judgment could have been recovered for the amount of the penalty, but only as a penalty, and execution would have been limited to the damages which were proved, the judgment only standing as security for such damages. That was the position if the action was brought in respect of the penalty. At the same time the plaintiff would have been entitled to sue for general damages, and he would have recovered whatever damages were proved to have resulted in the ordinary course. In the present charter party the clause runs thus: 'Penalty for non-performance of this agreement proved damages not exceeding the estimated amount of freight'. It is a form which seems to have been in use for a considerable time, because in Scrutton on Charter-parties, 4th ed., p. 322, published in 1899, the form given is in substantially the same language—'penalty for non-performance of this agreement to be proved damages not exceeding estimated amount of freight due under this charter'. There is a

footnote: 'This clause is worthless and unenforceable.' Bailhache, *J.*, was of opinion that the parties here only intended to express in an extended form the effect of the ordinary penalty clause. He thought that the clause was nothing more than the old common form writ large. That is not quite accurate. Under the old form, as I have pointed out, judgment could be recovered for the penalty as such. Under the amended form the plaintiff could not recover judgment for the entire estimated amount of freight as a penalty, because it is not a penalty. The clause says that the penalty is to be the 'proved damages not exceeding the estimated amount of freight'. The proved damages as such cannot be a penalty, because that is the sum which the plaintiff is entitled to recover. The learned judge, has, however, given the true explanation of the clause, namely, that the framers of the clause endeavored to state the effect of the old form and they endeavored to improve it. At any rate the clause comes within that head of the charterparty which purports to provide a penalty for non-performance of the charter, and it has no reference to a claim for general damages. Whether or not the clause be meaningless as a penalty clause, it does not limit the amount which can be recovered under the charterparty as general damages. Suppose, for instance, an action were brought on the charterparty against the shipowner for breach of the implied condition to supply a seaworthy ship, it might be that the loss would be very great. The action could be brought on the charterparty, although it is usually brought on the bills of lading, and if it were brought effectively on the charterparty it could not be contended that in such a case the damages were so limited. In *Elderslie Steamship Co.* v. *Borthwick*, Lord Macnaghten said: 'It is a wholesome rule that a shipowner who wishes to escape the liability which might attach to him for sending an unseaworthy vessel to sea must say so in plain words.' In my opinion, having regard to the construction of the charterparty as a whole, this clause has no reference to the general damages; it has only reference to the penalty, and it may be that, owing to the language in which it is expressed, where the clause is in this form there is in strictness no penalty. It cannot, however, be held to limit the general damages recoverable for breach of contract."

Phillimore, *L. J.*, concurred in the judgment of Swinfen Eady, *L. J.*, though with hesitation. At page 849 he said:

"I am ready to agree, although reluctantly, with the other members of the Court upon this ground, and upon this ground only, that the parties have used the word 'penalty', which *prima facie* means that it is a penalty, that they have not sufficiently varied from the old form, which had an established construction, to show that they intended that there should be any serious variation other than that which I have mentioned, and that it would have been very easy, if they had meant to frame a limitation of liability clause, to have expressed it in words about which there could be no doubt."

And Bankes, *L. J.*, said, at page 851:

"There remains one further point upon the construction of clause 13 of the charterparty. It is said on behalf of the defendants that upon the true construction of the exact language of that clause it ought to be interpreted as a clause limiting liability, and not as a penalty clause. If it is open to the shipowners to rely upon a strict construction of the clause, I am not prepared to say that that is not the meaning that ought to be, or at any rate that might be, placed upon it. The plaintiff's counsel, however, appeal to the principle which has been laid down in many cases, and amongst others in *Elderslie Steamship Co.* v. *Borthwick*, where Lord Macnaghten said: 'It is a wholesome rule that a shipowner who wishes to escape the liability which might attach to him for sending an unseaworthy vessel to sea must say so in plain words.' The history of this clause is this. For a long period of time there has been inserted in charterparties a clause which has come to be known as the penalty clause, and it has been expressed in a well-known form of words. The clause commenced 'Penalty for non-performance of this charter', or 'this agreement', and it ended with the words 'estimated amount of freight'. It has been accepted by business men and lawyers that the clause, so commencing and known as the penalty clause, is worthless and unenforceable. In my opinion, applying the principle

which Lord Macnaghten stated, if the shipowner desires to clothe his clause with vitality he must dress it up in an entirely new suit of clothes; but so long as its identity is concealed either wholly or partially by the old clothes he cannot escape the application of the rule that if he seeks to limit his liability he must do so in plain words. It cannot be said that he has used plain words so long as the opening words of the clause are in the well-known form which has been accepted to represent a worthless and unenforceable clause. Upon this ground I think that the defendants are not entitled to say that this is a clause limiting their liability."

Strom Bruks Aktie Bolag v. *Hutchinson*, 6 Sess. Cas. 5th Ser. 486, involved the following clause:

"Penalty for non-performance of this agreement, estimated amount of freight on quantity not shipped in accordance herewith."

In the Scotch Court of first instance the Lord Ordinary said, 6 Sess. Cas. 5th Ser., at page 488:

"The defender's first contention is that the penalty clause of the charter limits the damage payable for non-performance to the estimated freight on the quantity not shipped. I do not, however, consider that there is anything in this contention. I see nothing to take the case out of the general rule that a penalty clause attached to a charter does not deprive the shipper of his option to have his damages assessed at common law."

On appeal to the Court of Session, Lord McLaren said, 6 Sess. Cas. 5th Ser., at page 493:

"The defender's first proposition is that the penalty clause of the charter party restricts the claim to a sum equal to 'an estimated amount of freight on quantity not shipped'. Now, without admitting that any unqualified rule can be laid down for determining whether 'penalty' means penalty or liquidated damages, it may be affirmed that in general a claim of damages will not be held to be liquidated unless there is some intelligible relation be-

tween the specified penalty and the damage which may be or has been sustained. In the present case 'estimated amount of freight' is intelligible as a measure of damages where the shipper fails to supply cargo at the proper time, and the owners have lost their freight. But it is not a measure that can be applied to the case of a breach of contract by the shipowner, because what the merchant suffers by such breach is not a loss of freight, or of anything corresponding to freight, but the loss of profit on a resale, or the loss of the use of the goods for the purposes of his business. Even if the question were not settled by authority and practice, as I think it is, I should be of opinion that a penalty clause in the terms quoted does not deprive the shipper of his right to have an award of damages commensurate with the loss which he is able to prove."

On appeal to the House of Lords Lord Macnaghten said, 10 Asp. M. C. 138, 139:

"In the first place the respondents contended that, by the terms of the charter-party, damages for breach of contract was limited to the estimated amount of freight on quantity not shipped. Both courts have rejected this contention, treating the question as settled by authority. On this point I have nothing to add to what was said by the Lord Ordinary and by Lord M'Laren in the Court of Session."

Clause 24 has nothing in common with those contract clauses which serve to limit liability. The clauses in bills of lading limiting liability to $100 or to invoice value show an intelligible and clearly intended relation between the limit of liability fixed and the subject matter contracted about, being upheld on the theory that the limit of liability is based on the value of the goods or that the freight rate is fixed in contemplation of the limited value of the goods. See *Hart* v. *P. R. R. Co.*, 112 U. S. 331, 337; *Pierce* v. *Wells Fargo & Co.*, 236 U. S. 278, 283;

Hohl v. *Nord-Deutscher Lloyd*, 175 Fed. Rep. 544. Even such clauses are not upheld when they are ambiguous. *Lines* v. *Atlantic Transport Co.*, 223 Fed. Rep. 624.

Likewise, the cesser clause in charter-parties, which provides that after the cargo is loaded the charterer's liability shall cease, is uniformly limited to those liabilities of the charterer to the shipowner which are protected by a lien on the goods. In *Clink* v. *Radford* [1891] 1 Q. B. 625, 627, Lord Esher said:

"In my opinion the main rule to be derived from the cases as to the interpretation of the cesser clause in a charter-party, is that the court will construe it as inapplicable to the particular breach complained of, if by construing it otherwise the shipowner would be left unprotected in respect of that particular breach, unless the cesser clause is expressed in terms that prohibit such a conclusion. In other words, it cannot be assumed that this shipowner without any mercantile reason would give up by the cesser clause rights which he had stipulated for in another part of the contract."

See also *Hansen* v. *Harrold Bros.* [1894] 1 Q. B. 612; *Crossman* v. *Burrill*, 179 U. S. 100; *Elvers* v. *Grace & Co.*, 244 Fed. Rep. 705.

Another illustration of the cutting down of exemption is the "personal contract" doctrine in cases of limited liability under the Revised Statutes, where, notwithstanding the provision of the statutes that in no case shall the liability of the owner exceed the value of the vessel and her freight pending at the end of the voyage, it is held that the liability of the owner on personal contracts is not limited by the statute. See *Great Lakes Towing Co.* v. *Mill Transp't Co.*, 155 Fed Rep. 11; *Pendleton* v. *Benner Line*, 246 U. S. 353; *Luckenbach* v. *McCahan Sugar Ref'g Co.*, 248 U. S. 139.

LAST POINT

IT IS RESPECTFULLY SUBMITTED THAT THE DECISION OF THE CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED, WITH COSTS.

BURLINGHAM, VEEDER, MASTEN & FEAREY
Proctors for Respondent-Libellant

ROSCOE H. HUPPER
GEORGE H. TERRIBERRY
Of Counsel

March, 1920.

E307

THE ATLANTEN.[1]

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 171. Argued March 10, 1920.—Decided March 22, 1920.

A charter party provided that, should any dispute arise, it should be settled by referees, to be appointed by the captain and the charterers respectively, whose decision, or that of an umpire, should be final, and that any party attempting to revoke such submission to arbitration without permission of court should be liable to pay the estimated freight as liquidated damages. *Held*, that this could not be construed to apply where there was not merely a dispute in carrying out the contract but a substantial repudiation of it, by the shipowner's declining to go on with the voyage unless the freight rate were increased. P. 315.

A clause in a charter party: "Penalty for non-performance of this agreement to be proved damages, not exceeding estimated amount of freight," *held* inapplicable where the shipowner substantially

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[1] The docket title of this case is *Rederiaktiebolaget Atlanten* v. *Aktieselskabet Korn-Og Foderstof Kompagniet.*

repudiated the contract by refusing to go on with the voyage. P. 316.

Such a clause provides a penalty and leaves the ordinary liability upon the undertakings of the contract unchanged. *Id.*

Presumption that in such a matter the rule on the continent of Europe is the same as in England and the United States. *Id.*

250 Fed. Rep. 935, affirmed.

THE case is stated in the opinion.

Mr. Clarence Bishop Smith for petitioner.

Mr. Roscoe H. Hupper, with whom *Mr. George H. Terriberry* was on the brief, for respondent.

Mr. Julius Henry Cohen, by leave of court, filed a brief as *amicus curiæ*.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a libel in admiralty by a Danish corporation, the respondent here, against a Swedish corporation, owner of the steamship Atlanten, for breach of a charter party made in Denmark, on September 30, 1914. The voyage was to be from a southern port in the United States to Danish ports to be named. On January 8, 1915, the owner (the petitioner) wrote to the charterers that owing to the increased war risk and other difficulties "we are compelled to cancel the Atlanten's charter party Pensacola to Scandinavia, and are ready to take all the consequences the Court after Clause No. 24 in the charter party will compel us to pay, not exceeding the estimated amount of freight." It offered to proceed, however, if the charterers would pay a higher rate. This libel was brought five months later. The owner in its answer admitted the breach, but set up the clause 24 of the char-

ter "Penalty for non-performance of this agreement to be proved damages, not exceeding estimated amount of freight " and clause 21 "If any dispute arises the same to be settled by two referees, one appointed by the Captain and one by charterers or their agents, and if necessary, the arbitrators to appoint an Umpire. The decision . . . shall be final, and any party attempting to revoke this submission to arbitration without leave of a court, shall be liable to pay to the other, or others, as liquidated damages, the estimated amount of chartered freight." It is alleged that by the laws of both Denmark and Sweden such a provision is binding and that arbitration is a condition precedent to the right to sue by reason of any dispute arising under the charter. The case was heard on exceptions to the answer. The District Court made a decree for the libellant for full damages, 232 Fed. Rep. 403, and this decision was affirmed by the Circuit Court of Appeals. 250 Fed. Rep. 935. 163 C. C. A. 185.

With regard to the arbitration clause we shall not consider the general question whether a greater effect should not be given to such clauses than formerly was done, since it is not necessary to do so in order to decide the case before us. For this case it is enough that we agree substantially with the views of Judge Learned Hand in the District Court and Judge Hough in the Circuit Court of Appeals. Their opinion was that the owner repudiated the contract and that the arbitration clause did not apply. It is true that it would be inaccurate to say that the owner repudiated the contract *in toto*, for the letter that we have quoted assumed that the contract was binding and referred to it as fixing the liability incurred. It meant simply that the owner would not proceed with the voyage. *United States* v. *McMullen*, 222 U. S. 460, 471. But we agree that such a refusal was not a "dispute " of the kind referred to in the arbitration clause.

As Judge Hand remarked, the withdrawal was before

the voyage began and it is absurd to suppose that the captain, who might be anywhere in the world, was to be looked up and to pick an arbitrator in such a case. The clause obviously referred to disputes that might arise while the parties were trying to go on with the execution of the contract—not to a repudiation of the substance of the contract, as it is put by Lord Haldane in *Jureidini* v. *National British & Irish Millers Ins. Co., Ltd.*, [1915] A. C. 499, 505. The allegation in the answer as to the law of Denmark and Sweden we do not understand to mean more than that arbitration agreements will be enforced according to their intent. It does not extend the scope or affect the construction of an agreement which, as we should construe it apart from that allegation, does not apply to the present case.

Paragraph 24 of the charter, supposed to limit liability, may be met in similar and other ways. If it were a limitation of liability it hardly could be taken to apply to a case of wilful unexcused refusal to go on with the voyage. It obviously was not intended to give the owner an option to go on or stop at that price. But furthermore, as was fully pointed out below, the clause is a familiar modification of a very old one, and in the courts of England that have had frequent occasion to deal with it, is held to be only a penalty, even in the present form, and to leave the ordinary liability upon the undertakings of the contract unchanged. *Wall* v. *Rederiaktiebolaget Luggude*, [1915] 3 K. B. 66. *Watts, Watts & Co., Ltd.*, v. *Mitsui & Co., Ltd.*, [1917] A. C. 227. [1916] 2 K. B. 826, 844. *Watts* v. *Camors*, 115 U. S. 353. Presumably this is also the continental point of view. We are of opinion that the decree was clearly right.

Decree affirmed.